Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioner,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the California Supreme Court violated the First Amendment's Establishment and Free Exercise clauses by interpreting a state statute to confer a special power on certain religious denominations to create trusts for their own benefit in the real property of affiliated local church corporations, solely by declaring that they have unilaterally enacted a post-hoc internal rule, when no other person or entity has such a power under state law?
2. Whether this Court's reference in *Jones v. Wolf*, 443 U.S. 595 (1979), to denominational canons and constitutions as potential sources of neutral principles of property law can be read, consistently with the First Amendment, as trumping other secular laws governing property rights?

PARTIES TO THE PROCEEDING

Petitioners: The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, a California Nonprofit Religious Corporation; The Rev. Praveen Bunyan; The Rev. Richard A. Menees; The Rev. M. Kathleen Adams; James Dale; Barbara Hettinga; Paul Stanley; Cal Trent; John McLaughlin; Penny Reveley; Mike Thompson; Jill Austin; Eric Evans; Frank Daniels; Cobb Grantham; and Julia Houten.

Respondents: The Protestant Episcopal Church in the Diocese of Los Angeles; Jane Hyde Rasmussen; The Right Rev. Robert M. Anderson; The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles; The Episcopal Church.

Amici Curiae Below: The Charismatic Episcopal Church, The Rector, Wardens and Vestrymen of All Saints' Parish in Long Beach, California, a California Nonprofit Religious Corporation, The Rev. William A. Thompson, The Rev. Ronald K. White, David Thornburg, Jenna Iovine, Paul Croshaw, Bill Davidson, Vondi Forrester, John Hall, Gail Hauck, Peter Jordan, Dan Kamikubo, Jeff Lang, Jo Smith, Sara Willien, Hon. Fred Woods, The Rector, Wardens and Vestrymen of St. David's Parish in North Hollywood, California, a California Nonprofit Religious Corporation, The Rev. Jose Poch, Dianne Charves, Deborah Chase, William Coburn, Primi Esparza, Laurie Leney, Wendy Leroy, Megan Mcallister, Alwayne Palmer, Janet Palmer, Benson Usiade, Chris Woodrum, The Presbyterian Lay Committee, Iglesia Evangelica Latina, Inc., Juan A. Reyes, Aida Haydee Reyes, Ahuner Portillo, Audias

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Presbyterian Church (U.S.A.), the Synod of Southern California and Hawaii and the Presbytery of Hanmi on behalf of Respondents Jane Hyde Rasmussen; The Right Rev. Robert M. Anderson; The Protestant Episcopal Church in the Diocese of Los Angeles; The Right Rev. J. Jon Bruno, Bishop Diocesan of the Episcopal Diocese of Los Angeles.

Clifton Kirkpatrick, Joey Mills, Katherine J. Runyeon, Rev. Joseph Lee, Elder John Lococo, General Council on Finance and Administration of the United Methodist Church, Wesley Granberg-Michaelson, General Conference of the Seventh-day Adventists, Christian and Missionary Alliance, International Church of the Foursquare Gospel, Worldwide Church of God, and Holy Apostolic Catholic Assyrian Church of the East on behalf of Respondent The Episcopal Church.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, is a membership California nonprofit religious corporation with no parent corporation or stock.

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INTRODUCTION

Since 1950, Petitioner The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California ("St. James Church"), a separate nonprofit religious corporation under California law, has held clear title to church property in Newport Beach, California. Following a series of doctrinal disputes with the Episcopal Church and its diocese in Los Angeles, California (Respondents here, collectively "Episcopal Church"), the branch of the worldwide Anglican Communion of churches with which St. James Church was originally affiliated, St. James Church voted to affiliate with a different branch of the Anglican Communion. The Los Angeles Diocese sued to take St. James Church's property. Although the deeds are unambiguously held in the name of the St. James Church corporate entity, the Episcopal Church claim the property by virtue of a disputed 1979 amendment to the Canons of the Episcopal Church (alleged by the Episcopal Church to have been adopted thirty years after St. James Church first took clear title to the property), by which the broader Church association unilaterally claimed for itself a trust interest in the property of St. James Church.

While ostensibly applying the neutral principles of law approach commended by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), the California Supreme Court interpreted Section 9142(c) of the California Corporations Code to permit churches claiming to be hierarchical to unilaterally create a trust interest for their own benefit in property in which legal title is held by an affiliated local church corporation, thus

giving dispositive and retroactive weight to the disputed 1979 Canon while disregarding other neutral principles including deeds and property statutes.

The issues thus presented by this petition involve whether the California Court's application of *Jones* and its interpretation of Section 9142(c) impermissibly prefer self-proclaimed hierarchical denominations to other churches and intrude into areas of religious doctrine and polity in violation of the First Amendment's Establishment and Free Exercise clauses. The important constitutional issues involved include (1) whether civil courts may, consistent with the First Amendment, decide that a religion is purely hierarchical where the matter is theologically disputed; and (2) whether such an *ecclesiastical* determination can be permitted to allow the purported hierarchical denomination to adopt, unilaterally, post-hoc rules creating a trust interest for itself, trumping undisputed *legal* title held by the local religious corporation.

Review by this Court of the important constitutional issues at stake is warranted.

OPINIONS BELOW

The opinion of the Supreme Court of California, as modified on denial of rehearing, is reported at 198 P.3d 66 (Petitioners' Appendix ("Pet. App.") at 1a-43a). The opinion of the Court of Appeal is reported at 61 Cal.Rptr.3d 845 (Cal. Ct. App. 4th Dist. 2007) (Pet. App. at 44a-148a). The orders of the trial court dismissing the two amended complaints with prejudice are reproduced at Pet. App. 149a-169a. The order denying the petition for rehearing on February 25, 2009, is reproduced at Pet. App. 170a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of California was entered on January 5, 2009 (Pet. App. 1a). A timely petition for rehearing was denied, and the opinion modified, on February 25, 2009. (Pet. App. 170a). A timely request for extension was granted by Justice Kennedy, extending the time in which to file this petition until June 25, 2009. The jurisdiction of this Court is proper under 28 U.S.C. § 1257(a) on the ground that California Corporations Code Section 9142(c), as interpreted by the Supreme Court of California, is repugnant to the Constitution of the United States, specifically, the Establishment and Free Exercise clauses of the First Amendment, as incorporated and made applicable to the States by the Fourteenth Amendment.

Although the case has been remanded for further proceedings, the California Supreme Court's decision below is a final interpretation of Section 9142(c), and it is final with respect to that Court's determination that its interpretation is constitutionally valid. The judgment is therefore "final" for purposes of Section 1257(a) under well-established exceptions to the finality rule. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (describing fourth category of exceptions as "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds").[1]

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[1] Petitioners do not contend that this case fits within *Cox Broadcasting*'s third category of exceptions, "in which later re-

Because neither the State of California nor any agency, officer, or employee thereof is a party to this action, 28 U.S.C. § 2403(b) may apply; this Petition is therefore being served concurrently on the Attorney General of California.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protecttion of the laws.

Section 9142 of the California Corporations Code provides, in relevant part:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:
>
> > (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution

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view of the federal issues cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting*, 420 U.S., at 481.

of its board of directors to so hold those assets in trust.

(2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.

(3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments creating the trusts. However, nothing in this subdivision shall be construed to permit the amendment of the articles to delete or to amend provisions required by Section 214.01 of the Revenue and Taxation Code to a greater extent than otherwise allowable by law.

STATEMENT OF THE CASE

Since its incorporation in 1949, St. James Church and its congregation have worshipped at the St. James Church property in Newport Beach, California. The church property now includes a 7800-square-foot church, a fellowship hall, administrative offices, Sunday school classrooms, a rectory, and adjoining parking. The congregation is part of the thirty-eight member worldwide Anglican Communion that dates to King Henry VIII's break in 1534 from the Roman Catholic Church. Pet. App. 3a. Un-

til 2004, St. James Church was also affiliated with respondent The Episcopal Church, the branch of the Anglican Communion most prevalent in the United States. The Episcopal Church is an unincorporated association headquartered in New York City, and comprises Episcopal dioceses in the United States, including respondent The Protestant Episcopal Church in the Diocese of Los Angeles ("The L.A. Diocese").

Unlike the Roman Catholic Church, in which each individual Church property is typically held in the name of the bishop who heads the geographically-based diocese in which the particular church is located, *see* Stephen M. Bainbridge and Aaron H. Cole, *The Bishop's Alter Ego,* 46 J. Catholic Legal Studies 65, 69 (2007), title to the St. James Church property has, with a single brief exception, always been held in the name of the local corporation.[2]

In 1979, thirty years after St. James Church was incorporated and began taking title to its properties, the Episcopal Church purportedly added Canon I.7.4 (the "Dennis Canon") to its Church Canons. The Dennis Canon unilaterally asserted that all church property held in the name of individual local, and separately incorporated, churches such as St. James Church is held in trust for the Episcopal Church and the local diocese. Although the corporate articles of

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[2] The L.A. Diocese served as a mere conduit for the donation of one parcel of property by a private Newport Beach business in 1950, and promptly transferred it to St. James Church for consideration without any reservation of a reversionary or trust interest. All subsequent parcels of property were purchased by St. James Church with its own funds raised from its members.

St. James Church previously referenced the Canons, nothing like the Dennis Canon, purporting to create a trust interest in local church property, existed at the time those articles were adopted, and no deed conveying the purported trust interest from St. James Church was ever executed.

As the result of significant theological disagreements with the Episcopal Church over whether to reassert core doctrines of the Christian faith or to reappraise those doctrines in light of modern social developments, the Board of St. James Church decided in July 2004 to end its association with the Episcopal Church and affiliate instead with the Anglican Church of Uganda, another national member church of the thirty-eight member worldwide Anglican Communion. The Board's decision was overwhelmingly ratified by the members of St. James Church at a special meeting on August 16, 2004. One week later, the members approved an amendment to St. James Church's articles of incorporation deleting all references to the L.A. Diocese, the Episcopal Church, and their constitutions and canons by a vote of 341 to 4. The amended articles of incorporation were accepted for filing by the Secretary of State of California on August 24, 2004. Pet. App. 51a.

In response to St. James Church's change of Anglican affiliation, the L.A. Diocese, together with two of its bishops and a single former lay member of St. James, sued St. James Church, its volunteer directors, and three of its clergy,[3] alleging *inter alia* that

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[3] The individual defendants, also petitioners here, are the then Rector, two priests, two Wardens, and individual volunteer Vestrymen of St. James Church. We refer in this Petition to all

St. James Church forfeited its property because of the disaffiliation and that the volunteer directors breached their fiduciary duties by disaffiliating from the Episcopal Church. The L.A. Diocese's Complaint sought a declaration enforcing a trust in its favor in the real and personal property of St. James Church, reversing the disaffiliation and forcing St. James Church to remain Episcopalian. It even sought punitive damages against the individual volunteer directors of St. James Church.

The national Episcopal Church thereafter filed a Complaint-in-Intervention seeking a judicial declaration that all property held by St. James Church is impressed with a trust in favor of the denomination.

St. James Church filed a special motion to strike the L.A. Diocese's complaint as a strategic lawsuit against public participation.[4] The trial court granted the motion, and also sustained without leave to amend St. James Church's demurrer against the Episcopal Church's first amended Complaint-in-Intervention.

The L.A. Diocese and the Episcopal Church both appealed the decision. In a break with well-established California precedent applying neutral principles of law for resolution of church property disputes[5]—the approach approved and even encour-

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of the defendants/petitioners collectively as "St. James Church."

[4] *See* Cal. Civ. Proc. Code § 425.16.

[5] *See, e.g., Guardian Angel Polish Nat'l Catholic Church of L.A., Inc. v. Grotnik*, 118 Cal.App.4th 919, 930 (Cal. Ct. App. 2004); *Protestant Episcopal Church v. Barker*, 115 Cal.App.3d 599, 614 (Cal. Ct. App. 1981).

aged by this Court in *Jones*—the Court of Appeal reversed, holding that it was required to defer to the determinations of the highest church authority in the hierarchical church that the Episcopal Church claimed itself to be. Pet. App. 147-148a. The Court of Appeal also held that Section 9142(c) of the California Corporations Code permitted a religious entity claiming to be a superior governing body in a hierarchical church to unilaterally establish a trust for its own benefit in property in which record title was vested in another entity. Pet. App. 121a-122a.

St. James Church sought review by the Supreme Court of California, specifically noting that the neutral principles of law approach, rather than the hierarchical deference approach adopted by the Court of Appeal, allowed for the resolution of church property disputes "without entangling courts in religious disputes, favoring or establishing any particular religious form, or interfering with the free exercise of religion by any group, large or small." Petitioners' Opening Brief on the Merits at 15-16 (Nov. 13, 2007), *Episcopal Church Cases*, 198 P.3d 66 (2009) ("POBM"). St. James Church contended that in the wake of *Jones*, this Court's decisions in such cases as *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), and *Serbian Eastern Orthodox Diocese of U.S. v. Milivojevich*, 426 U.S. 696 (1976), "illustrate that a 'deference' approach is appropriate *only* where the dispute cannot be determined without making a religious determination"—not for routine property disputes that can be decided according to neutral principles of state law. POBM at 22-24. "[T]he 'deference' rule actually leads civil courts

straight into the constitutional quagmire of deciding religious questions preliminary to the rule's application, and of furthering certain forms of religion over others," noted St. James Church, and is therefore unconstitutional because it forces the courts to resolve contested theological questions about the nature and scope of a church hierarchy, gives preference to hierarchical churches over congregational churches, and interferes with the free exercise religious choices of denominations that choose to have a balance of local and general authority. POBM at 30-35, 48.

The Supreme Court of California affirmed the Court of Appeal's decision, but on different grounds. Recognizing that the method used by a state for resolving church property disputes "must not violate the First Amendment to the United States Constitution," Pet. App. 11a-12a, the Court purported to adopt a neutral principles of law approach, relying on this Court's recitation of sources to be considered, "such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property." Pet. App. 24a (citing *Jones*, 443 U.S., at 600).

The California Supreme Court then elevated a purported church rule over record title and state property laws by interpreting Section 9142(c) of the Corporations Code to permit a self-proclaimed hierarchical denomination to unilaterally create a trust interest for its own benefit in property unambiguously owned by the local church corporation. In so doing, the Court expressly rejected the contention by

St. James Church that the interpretation it was adopting "would unconstitutionally promote and establish denominational religion." Pet. App. 35a-36a.

The Court also found that the disputed canon could create a trust in favor of the denomination decades after St. James Church first held clear record title mainly because St. James Church had generally agreed thirty years earlier "to be bound by the constitution and canons of the Episcopal Church," Pet. App. 24a, neither of which contained a trust provision at the time.

In a concurring and dissenting opinion, Justice Kennard took issue with the majority's claim that it was applying a neutral principles of law approach. Noting that "[n]o principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner," Justice Kennard contended that the majority had applied "the principle of government [or deference to hierarchy] approach," interpreting Section 9142(c) to create "a special principle applicable solely to religious corporations." Pet. App. 41a-43a.

St. James Church filed a petition for rehearing asking the Court to clarify its ruling in light of the procedural posture of the case (namely, dismissal at the trial court before St. James Church had answered the two first amended complaints). The Court denied the petition for rehearing on February 25, 2009, but modified its opinion to reflect that the holding was based on the existing record before it.

REASONS FOR GRANTING THE WRIT

I. The California Supreme Court Has, By "Legislative Fiat," Empowered Self-Proclaimed Hierarchical Churches to Unilaterally Create Trust Interests For Themselves in the Property of Affiliated Local Church Corporations, Impermissibly Preferring Hierarchical Religion and Infringing on the Free Exercise Rights of Local Congregations.

The California Supreme Court held that Section 9142(c) of the California Corporations Code allowed a hierarchical church to create, unilaterally, a trust interest in property titled in the name of separately incorporated local churches affiliated with it.[6] As Justice Kennard pointed out in her concurring and dissenting opinion, the Court's interpretation of Section 9142(c) means that "through legislative fiat a 'superior religious body or general church' may *unilaterally* create trusts in its favor over property held by the smaller church that was a member of the general church when the trust was created." Pet. App. 41a. That "legislative fiat," Justice Kennard correctly noted, "creates a special principle applicable solely to religious corporations." *Id.*, at 43a.

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[6] While not addressing whether a "superior religious body" or "general church" could waive its purported trust interest in a particular case, or not enforce it where an affiliated local church never agreed to be bound by denominational rules, the interpretation of Section 9142(c) adopted by the California Supreme Court is final, and the constitutionality of that interpretation is now a matter for resolution by this Court.

Although Justice Kennard mistakenly believed that such preferential treatment was constitutional "only because the dispute involves religious bodies and then only because the principle of government approach, permissible under the First Amendment, allows a state to give unbridled deference to the superior religious body or general church," Pet. App. 42a, this Court has never allowed "unbridled deference" to *all* claims that might be made by a hierarchical church. Rather, even for purely hierarchical churches (and certainly for semi-hierarchical, mixed churches), the courts only owe deference "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried," not to temporal matters that do not involve spiritual determinations. *Watson v. Jones*, 80 U.S. (13 Wall.), at 727; *cf. Milivojevich*, 426 U.S., at 734 (Rehnquist, J., dissenting) (criticizing "blind deference" even to ecclesiastical decisions of hierarchical churches as creating "serious problems under the Establishment Clause").

Nor has this Court allowed in non-property-dispute contexts the creation of special, preferential rules available only to certain religious denominations and not others (other than those that merely accommodate religious belief and practice). Just as a statute that targets certain religions for disfavored treatment is an unconstitutional interference with free exercise rights (absent a compelling governmental interest), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), so, too, a statute that treats some religious denominations more favorably than others is an unconstitutional

establishment of religion, *Larson v. Valente*, 456 U.S. 228, 246 (1982) (citing *Everson v. Board of Ed.*, 330 U.S. 1, 15 (1947)).

Here, the California Court's interpretation of Section 9142(c) has given to general church associations the ability to unilaterally create for themselves a trust interest in property to which a local affiliated church corporation holds clear record title, merely because the general church association claims to be a superior body in a hierarchical church structure. This prefers certain kinds of religious organizations over others, in violation of the Establishment Clause. It also interferes, in violation of the Free Exercise Clause, with the deliberate religious choices of local church congregations that have chosen to affiliate for ecclesiastical purposes but not for other purposes such as property ownership, particularly where, as here, the local church has attempted through incorporation to secure its property interests so that any decision to dissociate because of doctrinal disputes would not also carry with it the costly burden of abandoning the place of religious worship purchased and maintained by the local congregation.

The statutory conferral of such unilateral authority is not necessary to protect the free exercise rights of congregations preferring a purely hierarchical religious structure. Explicit trusts in favor of the denomination can easily be created by any donor or property owner who prefers such a structure. *See, e.g.*, Cal. Prob. Code § 15200. Or record title to the local property can be held by the higher ecclesiastical authority as a "corporation sole," as Roman Catholic Bishops hold title to the local church property located within their diocese. *See, e.g.* Cal. Corp.

Code § 10002 ("A corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing the affairs, property, and temporalities thereof"). The use of such "pure" neutral principles of law actually accommodates a much broader range of religious choices than a neutral principles approach that, through preferential statutes and judicial deference to denominational rules, tilts the balance decidedly toward often-disputed assertions of hierarchical authority. *Cf.* K. Greenawalt, *Hands Off! Civil Court Involvement In Conflicts Over Religious Property*, 98 Colum. L. Rev. 1843, 1851 (1998) (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals").

A "pure" neutral principles approach is also more consistent with this Court's recent religion clause jurisprudence. The hallmark in current Free Exercise doctrine is "valid and neutral laws of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)). One of the standards under the Establishment Clause is non-preferentialism. *See, e.g., Rosenberger v. Rector*, 515 U.S. 819, 880 (1995) (Thomas, J., concurring) ("the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others"). Although this Court in *Jones* did not explicitly derive its neutral principles of law standard "from standard free exercise and es-

tablishment tests," Greenawalt, *supra*, at 1845, the resemblance is clear, and appropriate.

Because the California Court's interpretation of Section 9142(c) raises important constitutional issues that have not been, but should be, resolved by this Court, certiorari is warranted. That the California Court's decision flows from the application (or misapplication) of the neutral principles of law approach commended by this Court in *Jones*, as described below, makes this Court's review even more appropriate.

II. By Deferring to Contested Church Canons Rather Than Secular Documents Such As Deeds of Title in Its Application of Neutral Principles of Law, the California Supreme Court Decided Important Questions of First Amendment Law That Have Not Been, But Should Be, Resolved By This Court.

A. *Jones* did not address the extent to which church canons were an appropriate source of neutral principles of law in cases where a court must decide how a church is structured.

In *Jones*, this Court approved, and indeed commended, a neutral principles of law approach for deciding church property disputes. "[S]ettling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of

the general church concerning the ownership and control of church property," noted the Court, "entailed 'no inquiry into religious doctrine.'" 443 U.S., at 603 (summarizing prior *per curiam* holding in *Maryland & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970) (*"Maryland & Va. Churches"*)).

Jones addressed a dispute between a local church and the general Presbyterian church, a church which this Court has described as hierarchical. *Jones*, 443 U.S., at 597; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 442 (1969). The *Jones* Court's inclusion of the constitution of a general church in its litany of sources of neutral principles of law may be appropriate where the hierarchical nature of the general church is uncontested, as in *Jones* itself. But where, as here, the scope and nature of any asserted hierarchy is itself in dispute, where "the locus of control" is "ambiguous," the *Jones* Court strongly suggested that a searching inquiry of church constitutions and other relevant documents would be "impermissible." *Jones*, 443 U.S., at 605.

Yet that is exactly what the California Supreme Court has required in interpreting Section 9142(c) as empowering denominations that claim to be hierarchical to unilaterally impose trust rules, because civil courts must first determine, as a threshold inquiry under Section 9142(c), whether one religious body is "superior" to another, or whether a church is "general" or not. Trial court judges are not expert in church government or structure, or how religious groups are affiliated with one another, particularly in today's society with hundreds if not thousands of

diverse religious groups, nor should they have to be as this "searching inquiry" unconstitutionally entangles courts in religion. Merely deferring to a denomination's description of its own structure does not solve the problem because, as here, denominational claims of "hierarchy" are often disputed or more complex than meets the eye.

Neither did the *Jones* Court confront the additional circumstance presented here, where some of the sources of neutral principles of law (such as the deeds) are in conflict with others (such as the canons of the denomination as they are alleged by one side in the litigation), or grapple with whether giving greater weight to denominational rules amounted to a rule of deference to a disputed hierarchical claim rather than application of neutral principles of law.

As this case makes manifestly clear, the *Jones* Court's litany of sources of neutral principles of law requires refinement in light of such circumstances, lest the courts be required to make the very kind of religious determinations that the neutral principles doctrine was designed to avoid. *See, e.g.*, Greenawalt, *supra*, at 1846 ("the Supreme Court should make certain revisions to [its two-alternatives] regime, treating as unconstitutional the 'standard' version of polity-deference and certain versions of neutral principles"). Quite simply, certiorari is warranted so that this Court can address whether post-hoc alterations in the constitution and canons of a general church, the hierarchical authority of which is contested, can trump local church ownership plainly reflected in property deeds consistently with neutral principles of law and the commands of the First Amendment.

B. By giving dispositive weight to a contested Church Canon, the Court below effectively decided core questions of religious doctrine and polity.

In apparent response to the decision in *Jones*, many mainline Protestant churches—both hierarchical and semi-hierarchical—adopted canons and rules purporting to create trust interests in the church property of affiliated local churches. Absent express agreement by the local church property owner, such provisions amounted to the unilateral declaration of a trust interest by the beneficiary of the trust, without any conveyance of a trust interest by the record owner of the property, and contrary to the statute of frauds in most states, including California. Cal. Prob. Code § 15206 ("A trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee . . . or settlor").

That is not what the *Jones* Court had in mind. Read in context, *Jones*'s reference to church constitutions and rules is limited to documents that are the product of *mutual* agreement between the parties: "[T]he *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property. *They* can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an *express* trust in favor of the denominational church. . . . [C]ivil courts will be bound to give effect to the result indicated by *the parties, provided it is embodied in some legally cognizable form*." *Jones*, 443 U.S., at 606 (emphasis added).

The need for express consent by the local church —the property owner—is unmistakable. *Jones* did *not* authorize national denominations to confiscate the property of affiliated local churches by canon fiat; all *Jones* invited was *mutual* pre-dispute agreements as to property ownership. The neutral principles method thereby retains its secular character, enforcing canons only if they qualify as traditionally expressed mutual agreements that comply with state property laws—thus obviating any concern about a civil court evaluating church documents.

Yet the Court below, purportedly following neutral principles of law, subordinated clear record title and longstanding state property laws to the 1979 amendment purportedly adopted by the Episcopal Church in the wake of *Jones*. Known as the "Dennis Canon," Canon I.7.4 of the canons of the general convention of the Episcopal Church provides:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Although the Dennis Canon may have been ratified by the general convention,[7] at no time did St. James Church ever expressly agree to anyone else having a trust interest in its property, or convey such a trust interest to the Episcopal Church, a statutory prerequisite for the creation of a trust interest in real property. Cal. Prob. Code § 15206. Rather, St. James Church simply agreed in its 1949 corporate charter to be bound "for the time being", Pet. App. 4a, by the canons of the Episcopal Church that complied with state law, which at the time contained no such provision asserting a trust interest in local church property. Basic hornbook law on voluntary associations does not allow a denomination to unilaterally amend its rules in order to divest a local church of property in which the local church has record title. 6 Am. Jur. 2d, Associations and Clubs § 6 ("*bylaws or rules cannot be enforced when they compel a citizen to lose his rights in accumulated assets* or to forego the exercise of other rights which are constitutionally inviolable" (emphasis added)); *cf. Budwin v. Am. Psychological Ass'n*, 24 Cal.App.4th 875, 879 (1994) ("a court will prohibit a private, voluntary association from enforcing a rule which is contrary to established public policy").

By elevating the disputed Dennis Canon over clear record title and hornbook trust law, the Court below necessarily accepted the Episcopal Church's doctrinal contention that it was a purely hierarchical church and thus "superior" or "general" under Section 9142(c), despite St. James Church's argument

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[7] As the Court below noted, whether the Dennis Canon was ratified by the general convention is disputed. Pet. App. 36a.

and reputable scholarly commentary to the contrary, POBM at 31-32; Raymond J. Dague & R. Wicks Stephens II, "Considerations Specific to Episcopalians," in A GUIDE TO CHURCH PROPERTY LAW: THEOLOGICAL, CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS 124, 129-35 (L. Lunceford, gen. ed., 2006) (contending that the Episcopal Church has a mixed sort of polity but that it is congregational with respect to property issues).[8] The Court below

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[8] The distinction between hierarchical churches (such as the Roman Catholic Church and the Church of Jesus Christ of Latter Day Saints) and congregational churches (such as those in the Baptist and Evangelical Free traditions) is more properly characterized as a continuum rather than a bright line, but this Court has generally treated the issue as a dichotomy between purely hierarchical and purely congregational denominations. *Jones*, 443 U.S., at 619 (Powell, J., dissenting); Greenawalt, *supra*, at 1851 ("The Court's treatment disregards . . . the possibility of a mix of authority"). Because most of the mainline Protestant denominations fall somewhere between the two poles, that dichotomy is overly simplistic, makes it more difficult for the courts to give effect to the full range of religious choices that the various denominations have made, and would seem to "establish" an inaccurate religious dichotomy. In fact, the Presbyterian Lay Committee filed an amicus brief before the California Supreme Court in this case disputing that the Presbyterian Church (U.S.A.) is hierarchical, and St. James Church likewise contends that the Episcopal Church is not hierarchical in matters of property and polity, and thus not a "superior religious body" within the meaning of Section 9142(c). "A church may . . . be hierarchical in some matters and congregational in others. For example . . . a church may be hierarchical in terms of internal administration and discipline, and yet congregational as far as control and use of its property is concerned." *The Primate & Bishops' Synod of the Russian Orthodox Church Outside Russia v. The Russian Orthodox Church of the Holy Resurrection, Inc.*, 617 N.E.2d 1031, 1033 (1993) (internal quotations omitted), *aff'd*, 418 Mass. 1001, 636 N.E.2d

thereby effectively resolved this church property dispute "on the basis of religious doctrine and practice," the very First Amendment violation that the neutral principles doctrine was designed to avoid. *Jones*, 443 U.S., at 602 (citing *Milivojevich*, 426 U.S., at 710; *Maryland & Va. Churches*, 396 U.S., at 368; *Hull*, 393 U.S., at 449).

Moreover, in opining that the Episcopal Church is a "superior religious body" or "general church" under Section 9142(c), the Court below appears to have relied on "religious precepts"—namely, its acceptance of the Episcopal Church's claim that it is spiritually and traditionally hierarchical—rather than on "purely secular terms" for a property dispute, as this Court in *Jones* required. *Jones*, 443 U.S., at 604.

More than mere error, this case highlights the very situation reserved in *Jones*, namely, when a key threshold issue to be resolved prior to application of state law is whether a particular church is purely hierarchical, purely congregational, or semi-hierarchical in nature.[9] To look to denominational rules for guidance, while disregarding well-established neutral principles of secular law like

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211 (1994). "Not every church is as intentionally hierarchical as the Roman Catholic Church." Greenawalt, *supra*, at 1851.

[9] It is significant to note that in none of the Supreme Court's "neutral principles" precedents was the hierarchical structure of the churches a contested issue. *See Jones*, 443 U.S., at 597-98; *Hull*, 393 U.S., at 441; *Milivojevich*, 426 U.S., at 698. In contrast, in *Watson*, the Court distinguished case law dealing with congregational churches and concluded that in congregational churches, "the rights of such bodies to use of the property must be determined by the ordinary principles which govern voluntary associations." *Watson*, 80 U.S., at 703, 724-25.

deeds and the statute of frauds, is to decide the question, and decide it by resort to core religious precepts. This, the courts cannot do, consistent with the Establishment Clause of the First Amendment. *Hull*, 393 U.S., at 449-50; *cf.* Greenawalt, *supra*, at 1877 ("the polity approach requires an initial decision about the nature of a church's government. . . . The crucial question is whether courts can identify principles of church government without reference to doctrine (or perhaps disputed doctrine)").

Moreover, allowing purported claims of hierarchy to trump local church incorporation, deeds and state property statutes, effectively disregards, as here, that the property at issue was donated or purchased by the local church, not the denomination, and thus infringes on the Free Exercise rights of the local congregation. *See, e.g.*, Jeffrey B. Hassler, *A Multitude of Sins?*, 35 Pepperdine L. Rev. 399, 408 (Jan. 2008) (citing Patty Gerstenblith, "Civil Court Resolution of Property Disputes Among Religious Organizations," in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 317 (James A. Serritella et al. eds., 2006)). Local churches with property would have to avoid affiliating with a denomination for fear of losing their property, or risk losing their property, even decades later, when they exercise their religious freedom to associate with another denomination. Greenawalt, *supra*, at 1851 (noting that the deference-to-hierarchy approach "effectively restricts the options of church members either to keeping final authority in local congregations or to leaving ultimate decisions about authority to superior tribunals"). Judicially forcing churches into a hierarchical-congregational dichotomy as a threshold inquiry to

resolve a property dispute does not recognize that today, many Protestant churches, including the Episcopal Church, do not have such neat categories of polity.

The time is ripe for this Court to clarify *Jones v. Wolf* and provide the lower courts with further guidance on the significant constitutional questions implicated when the scope and nature of the hierarchy is itself a disputed question. A holding by this Court that pure neutral principles of property law, without deference to the implicit or explicit doctrinal determinations found in church constitutions, would go a long way toward eliminating the constitutional problems inherent in the methodology adopted by the California Court below.

III. The State Courts Are Split On How, And Even Whether, To Apply Neutral Principles of Law When Assertions of Hierarchical Authority Are Contested.

The California Court is not the only Court to have grappled with the *Jones* formulation of neutral principles of law in the context of a semi-hierarchical church and, not surprisingly, the lower courts have resolved the issue in different and conflicting ways. The conflict is not limited to different policy decisions being made by state courts or state legislatures, as is permitted in our federal system, but rather involves radically different interpretations of what the Constitution compels, permits, and prohibits.

The state court split is perhaps most evident in the two cases now pending before this Court, one from Arkansas and this case from California. Both

involve property in which the local church has record title. Both involve claims to the property by a broader church association with which the local church had been affiliated. Both involve provisions in the documents of the broader church, adopted in the wake of this Court's decision in *Jones*, purportedly establishing a trust interest in the local church's property. And in both cases, the purported trust was created by the general church, for its own benefit, long *after* the local church had acquired title to the property in its own name and without the written consent of the local church. The Arkansas Supreme Court, ruling in favor of the local church, held that "courts must settle the [property] dispute by applying neutral principles of law," including the law found in both California and Arkansas that trust interests can only be created by the trustee, not unilaterally by the purported beneficiary of the trust. *Arkansas Annual Conf. of AME Church, Inc. v. New Direction Praise & Worship Ctr, Inc.*, 375 Ark. 428, 2009 WL 223122, *4-*5 (Ark. Jan 30, 2009), *petition for certiorari filed* (Apr 30, 2009) (No. 08-1352).

In stark contrast, the California Court below, purportedly applying the same neutral principles of law methodology approved by this Court in *Jones*, ruled for the denomination, holding that "[i]n a hierarchically organized church, the 'general church' *can* impress a trust on a local religious corporation of which the local corporation is a 'member' *if* the governing instruments of that superior religious body so provide." Pet. App. 35a. In reaching its conclusion, the California Court rejected the provision in California law that "[t]he owner of the legal title to property is presumed to be the owner of the full benefi-

cial title," Pet. App. 36a (citing Cal. Evid. Code § 662), and simply ignored the requirement in California law that "[a] trust in relation to real property is not valid unless evidenced by . . . a written instrument signed by the trustee . . . or settler," Cal. Prob. Code § 15206.[10]

The California Court also rejected as immaterial the fact, important in Arkansas, Alabama, Connecticut, and elsewhere, that the purported trust interest was added to the denomination's canons long *after* the local church had agreed to the canons in effect when it had taken title to the property free of any trust interest. *Compare* Pet. App. 33a-34a *with Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 309-10 (Ark. 2001) (holding that "neutral principles" required that the courts consider the canons of the general church in place at the time of the property conveyance, not a subsequently-enacted canon); *African Methodist Episcopal Zion Church in Am., Inc. v. Zion Hill Methodist Church, Inc.*, 534 So.2d 224, 225 (Ala. 1988) (holding property owned by the general church because "[f]or the entire time" the local church was affiliated with it, the general church discipline provided that local church property was held in trust for the general church); *New York Annual Conf. of United Methodist Church v. Fisher*, 438 A.2d

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[10] The New York Court of Appeals similarly gave "dispositive" weight to denominational rules even though, "applying the neutral principles of law approach," it found "nothing in the deeds," "certificate of incorporation" of the local church, or state statutes that established an express trust in favor of the denomination. *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 924-25 (N.Y. 2008).

62, 74 (Conn. 1980) (remanding for trial court to consider "what the provisions of the Book of Discipline were at the various times at which the various pieces of property were acquired").

The state courts are also split on whether the Constitution mandates or forbids a neutral principles approach in cases involving hierarchical and semi-hierarchical churches. The supreme courts of Louisiana and Alabama, and an intermediate appellate court in Illinois, for example, have held that the neutral principles approach is constitutionally compelled. *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982) ("the safeguards against laws establishing religion and prohibiting the free exercise thereof contained in the First Amendment and in [the nearly identical provision found in Art. I, § 8 of the Louisiana Constitution] *necessitate . . . adoption of the 'neutral principles' approach*" (emphasis added)); *Trinity Presbyterian Church of Montgomery v. Tankersley*, 374 So.2d 861, 866 (Ala.1979) ("the courts *must* decide the property disputes by looking at so-called 'neutral principles of law' and not resolve the underlying controversies over religious doctrine" (citing *Hull*, 393 U.S. 440, at 449) (emphasis added)); *York v. First Presbyterian Church of Anna*, 474 N.E.2d 716, 719 (Ill. App. Ct. 1984) ("where the litigation involves only the issue of property control, the *Watson* [hierarchical-deference] standard fails as a constitutional imperative"). Such holdings are not surprising, given this Court's acknowledgment in *Jones* that where the locus of hierarchical control is ambiguous, applying a "rule of compulsory deference" "would appear to require 'a searching and therefore impermissible' inquiry into church polity.'"

Jones, 443 U.S., at 605 (quoting *Milivojevich*, 426 U.S., at 723)); *see also Maryland & Va. Churches*, 396 U.S., at 369 (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine").[11]

Other state courts have recognized "that the majority opinion in *Jones* expressed a clear preference for the neutral principles approach over the polity [hierarchical-deference] approach." *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 94-95 (Colo. 1986) (en banc); *St. Paul Church, Inc. v. Board of Trustees of Alaska Missionary Conf. of United Methodist Church, Inc.*, 145 P.3d 541, 551 (Alaska 2006); *Bjorkman v. Protestant Episcopal Church in U.S. of Am. of Diocese of Lexington*, 759 S.W.2d 583, 585 (Ky. 1988); *Piletich v. Deretich*, 328 N.W.2d 696, 700 (Minn. 1982).[12]

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[11] For a particularly thoughtful analysis of why the neutral principles of law approach is constitutionally mandated whenever there is an "absence of clear expressions" in the governing church documents about the right of a local church to withdraw its affiliation, about the disposition of property in such a case, and about who is authorized to make such determinations, see *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 25-31 (N.J. 1980) (Schreiber, J., dissenting).

[12] Other States have adopted a neutral principles approach as preferred, but not necessarily constitutionally mandated. These cases include: *Arkansas Presbytery*, 40 S.W.3d, at 339; *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conf. of United Methodist Church*, 731 A.2d 798, 808 (Del. 1999); *Meshel v. Ohev Sholom Talmud*

At the other end of the spectrum are States such as West Virginia and New Jersey, holding that deference to the hierarchical church is constitutionally compelled, albeit after sometimes blending the line between a property dispute and an ecclesiastical one. *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W.Va. 1984) (holding, in a church property dispute, that "[w]here the proper hierarchical authority has decided a question of church doctrine, practice or government, the courts *must decline* to intervene" (emphasis added)); *id.*, at 924 (Miller, J., dissenting) (noting that the majority opinion suggests "that once a court finds a church to be hierarchical in structure, it *must defer* to the decision of the church's highest tribunal" (emphasis added)); *Protestant Episcopal Church in Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980) ("Only where no hierarchical control is involved, should the neutral principles of law princi-

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Torah, 869 A.2d 343, 354 (D.C. 2005); *Graffam v. Wray*, 437 A.2d 627, 634-35 (Me. 1981); *Babcock Mem'l Presbyterian Church v. Presbytery of Balt. of United Presbyterian Church in U.S.*, 464 A.2d 1008, 1016 (Md. 1983); *Fortin v. Roman Catholic Bishop of Worcester*, 625 N.E.2d 1352, 1356-57 (Mass. 1994); *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So.2d 200, 206 (Miss. 1998); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465, 467 (Mo. 1984) (en banc); *First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S.*, 464 N.E.2d 454, 459-60 (N.Y. 1984); *Presbytery of Beaver-Butler of United Presbyterian Church in U.S. v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1323 (Pa. 1985); *Foss v. Dykstra*, 319 N.W.2d 499, 500 (S.D. 1982); *see also Grutka v. Clifford*, 445 N.E. 2d 1015, 1021 n.4 (Ind. Ct. App. 1983); *Avondale Church of Christ v. Merrill Lynch*, 2008 WL 4853085, *5, No. E2007 02335-COA-R3-CV (Tenn. Ct. App. Nov. 10, 2008).

ple be called into play");[13] *cf. Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 932-33 (Mass. 1997) (holding that a dispute between factions of the local church over control of the local corporation and its property does not permit a *Jones*-type neutral principles analysis); *Presbytery of Cimarron v. Westminster Presbyterian Church*, 515 P.2d 211, 216-17 (Okla. 1973) (holding, pre-*Jones*, that the "Court is not free" to apply a neutral principles of law approach once a local church has affiliated with a national, hierarchical church).[14]

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[13] The Third Circuit has subsequently noted that the New Jersey Supreme Court may have moved away from that position, citing *dicta* in *Elmora Hebrew Ctr., Inc. v. Fishman*, 593 A.2d 725, 729-30 (N.J. 1991), that neutral principles *may* be employed, where appropriate, "[w]ithout regard to the governing structure of a particular church." *Scotts African Union Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 92-93 (CA3 1996).

[14] Several other state courts apply the hierarchical deference approach as preferred, though not necessarily constitutionally mandated. *See, e.g., Mills v. Baldwin*, 362 So.2d 2, 6-7 (Fla. 1978), *reinstated after remand*, 377 So.2d 971 (Fla. 1979) (applying *Watson*'s hierarchical deference approach even after GVR following *Jones*); *Cumberland Presbytery of Synod of the Mid-West of Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 418-19 (Ky. 1992); *Tea v. Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (held PECUSA is hierarchical, so property belonged to diocese); *see also Bennison v. Sharp*, 329 N.W.2d 466, 474 (Mich. Ct. App. 1982) (local church disaffiliated shortly after the Dennis Canon was adopted, but that was deemed irrelevant because the Court concluded that the Episcopal Church was a hierarchical church and then deferred to the hierarchy); *Calvary Presbyterian Church v. Presbytery of Lake Huron of United Presbyterian Church in U.S.*, 384 N.W.2d 92, 95 (Mich. Ct. App. 1986);

To one degree or another, the decisions mandating a hierarchical-deference approach all draw sustenance from the position articulated by Justice Powell in his dissenting opinion in *Jones*, contending that the neutral principles approach leads to "indirect interference by the civil courts with the resolution of religious disputes within the church [that] is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice." *Jones*, 443 U.S., at 613 (Powell, J., dissenting). But they ignore contrasting language in the *Jones* majority opinion, where Justice Blackmun noted that "even in *Watson*," in which the hierarchical deference approach was adopted, the Court stated that, regardless of the form of church government, it would be the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Jones*, 443 U.S., at 603 n.3 (quoting *Watson*, 80 U.S. (13 Wall.), at 722-23).

Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. Ct. App. 2003) (used hierarchical deference because it viewed the Episcopal Church as "connectional," not "congregational"); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700, 705-07 (Tex. Ct. App. 1986) (relying on *Brown v. Clark*, 116 S.W. 360 (Tex. 1909), in applying strict hierarchical deference, despite recognition that the *Brown* Court "may have felt compelled to follow the deference rule because it thought the *Watson* decision required its application at the time *Brown v. Clark* was decided"); *Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.*, 650 P.2d 231, 235-36 (Wash. Ct. App. 1982) (finding hierarchical structure dispositive, but remanding for factual determination on whether the church was hierarchical or congregational).

The California Court in this case pursued still another course, claiming to adopt the neutral principles methodology approved by this Court in *Jones* but in actuality following a deference-to-hierarchy model, as Justice Kennard pointed out in her dissenting opinion. Pet. App. 41a-42a.

The simple fact is that the interplay between *Jones*, on the one hand, and *Milivojevich* and *Watson*, on the other, "have caused confusion over whether deference to the decision rendered by the highest church judicatory to which it was presented in a hierarchical church is mandatory, or, whether civil courts can apply neutral principles even if the church is recognized to be hierarchical." *Southside Tabernacle*, 650 P.2d, at 234 n.2. That some state courts continue to think a *Watson* hierarchical deference approach to a property dispute is constitutionally mandated, while others think it is constitutionally forbidden, and still others, like California here, follow some amalgam of the two methodologies, demonstrates that further clarification from this Court is warranted.

The variety of interpretations given even to the neutral principles approach alone is dizzying. As one state judge noted after surveying the relevant cases:

> Apparently, the Supreme Court's optimistic conclusions concerning neutral principles have been misplaced. What has emerged is a welter of contradictory and confusing case law largely devoid of certainty, consistency, or sustained analysis.

J. Fennelly, *Property Disputes and Religious Schisms: Who Is the Church?*, 9 St. Thomas L. Rev. 319, 353 (1997). As Professor Kent Greenawalt has noted:

> the present law is highly unpredictable for religious groups that are neither as rigorously hierarchical as the Roman Catholic Church, nor as straightforwardly congregational as the Old Congregational Churches. As a result, the law's application is highly unpredictable for a vast range of religious organizations in the country.

Greenawalt, *supra*, at 1902. Denominations, as well as their local church affiliates, simply need greater certainty to their efforts to clarify the nature of local church property ownership than is available at present.

Despite the confusion, the problem is by no means intractable. Much of the existing confusion in the application of the neutral principles methodology can be traced to the inclusion of a denomination's constitution in the litany of sources of neutral principles of law articulated by this Court in *Jones*, just as Justice Powell predicted in his dissenting opinion. *Jones*, 443 U.S., at 612 (Powell, J., dissenting). Questions such as whether a trust provision in a denomination's rules was added before or after a local church affiliated with the denomination, or before or after a local church took title to property, or whether the process by which the trust provision was added to the denomination's documents met the normal legal requirements for the creation of trust interests, should be tested in the crucible of litigation under neutral principles of state law before dispositive

weight is given to denominational rules, lest the courts become entangled with church polity and doctrine.

Confronted with just such concerns, the New Hampshire Supreme Court has adopted a view of neutral principles that first considers "only secular documents such as trusts, deeds, and statutes" lest the courts become impermissibly entangled with questions of church doctrine, permitting a review of religious documents such as church constitutions and bylaws "only if" the secular documents leave ownership unclear under state property laws. *Berthiaume v. McCormack*, 891 A.2d 539, 547 (N.H. 2006).

Certiorari is warranted here to consider whether such a "pure" version of neutral principles, relying on ordinary secular rules of property ownership, would both resolve much of the confusion and conflict in the state courts and be more constitutionally sound than permitting, as the California court did below, a controverted, post-hoc church rule to trump clear secular legal documents and longstanding trust statutes regarding property ownership.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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Dated: June 23, 2009.

APPENDIX A

SUPREME COURT OF CALIFORNIA OPINION

198 P.3d 66 (Cal. 2009)

Jan. 5, 2009.

As Modified on Denial of Rehearing Feb. 25, 2009.

IN THE SUPREME COURT OF CALIFORNIA

	)	
	)	S155094
	)	Ct.App. 4/3
EPISCOPAL CHURCH	)	G036096,
CASES	)	G036408 &
	)	G036868
	)	Orange County
	)	JCCP No. 4392

In this case, a local church has disaffiliated itself from a larger, general church with which it had been affiliated. Both the local church and the general church claim ownership of the local church building and the property on which the building stands. The parties have asked the courts of this state to resolve this dispute. When secular courts are asked to resolve an internal church dispute over property ownership, obvious dangers exist that the courts will become impermissibly entangled with religion. Never-

theless, when called on to do so, secular courts must resolve such disputes. We granted review primarily to decide how the secular courts of this state should resolve disputes over church property.

State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of the property dispute involves a doctrinal dispute, the court must defer to the position of the highest ecclesiastical authority that has decided the doctrinal point. But to the extent the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the "neutral principles of law" approach. (*Jones v. Wolf* (1979) 443 U.S. 595, 597.) The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as Corporations Code section 9142.

Applying the neutral principles of law approach, we conclude that the general church, not the local church, owns the property in question. Although the deeds to the property have long been in the name of the local church, that church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents. These governing documents make clear that church property is held in trust for the general church and may be controlled by the local church only so long as that local church remains a part of the general church. When it disaffiliated from the general church, the

local church did not have the right to take the church property with it.

We must also resolve the preliminary procedural question of whether this action is subject to a special motion to dismiss under Code of Civil Procedure section 425.16 — generally called an "anti-SLAPP motion."[1] We conclude that this action is not subject to an anti-SLAPP motion. Although protected activity arguably lurks in the background of this case, the actual dispute concerns property ownership rather than any such protected activity. Accordingly, this action is not one "arising from" protected activity within the meaning of Code of Civil Procedure section 425.16, subdivision (b)(1). Hence, that provision does not apply.

We affirm the judgment of the Court of Appeal, which reached the same conclusions, although not always for the same reasons.

I. FACTS AND PROCEDURAL HISTORY

"The Protestant Episcopal Church in the United States of America . . . , organized in 1789, was the product of secession of the Anglican church in the colonies from the Church of England, the latter church itself being the product of secession from the Church of Rome in 1534." (*Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599, 606.) The church (hereafter the Episcopal Church) is governed by a general convention and a presiding bishop. In the United States, the Episcopal Church

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[1] The acronym "SLAPP" stands for "strategic lawsuit against public participation." (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 & fn. 1.)

is divided geographically into dioceses, including the Episcopal Diocese of Los Angeles (Los Angeles Diocese). Each diocese is governed by a diocesan convention and a bishop. A diocese is itself divided into missions and parishes, which are individual churches where members meet to worship. A parish is governed by a rector and a board of elected lay persons called the vestry. (See *Protestant Episcopal Church v. Barker*, *supra*, at pp. 606-607.) One such parish within the Los Angeles Diocese was St. James Parish in Newport Beach (St. James Parish).

St. James Parish began as a mission of the Episcopal Church in 1946. In 1947, members of the mission sought permission from the Los Angeles Diocese to organize as a parish. The members' handwritten application "promise[d] and declare[d] that the said Parish shall be forever held under, and conform to and be bound by, the Ecclesiastical authority of the Bishop of Los Angeles, and of his successor in office, the Constitution and Canons of the [Episcopal Church], and the Constitution and Canons of the Diocese of Los Angeles." Articles of Incorporation of St. James Parish, filed with the California Secretary of State on March 1, 1949, stated that the corporation was formed "[t]o establish and maintain a Parish which shall form a constituent part of the Diocese of Los Angeles in [the Episcopal Church]; and so that the Constitution and Canons, Rules, Regulations and Discipline of said Church . . . and the Constitution and Canons in the Diocese of Los Angeles, for the time being shall, unless they be contrary to the laws of this State, always form a part of the By-Laws and Articles of Incorporation of the corporation hereby formed and shall prevail against and govern

anything herein contained that may appear repugnant to such Constitutions, Canons, Rules, Regulations and Discipline . . . ." In 1991, St. James Parish amended its articles of incorporation, but it did not modify these provisions.

In 1950, the "Bishop of the Protestant Episcopal Church in Los Angeles" deeded the property on which the church building stands to St. James Parish for consideration of "less than $100.00." The deeds to the property have been in the name of the local church ever since.

Canon II.6 of the canons of the general convention of the Episcopal Church provides:

"Sec. 1. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this Church and subject to its Constitution and Canons.

"Sec. 2. It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

"Sec. 3. No dedicated and consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of for any worldly or common use, without

the previous consent of the Standing Committee of the Diocese.

"Sec. 4. Any dedicated and consecrated Church or Chapel shall be subject to the trust declared with respect to real and personal property held by any Parish, Mission, or Congregation as set forth in Canon I.7.4."

The record shows, and no one disputes, that the Episcopal Church first adopted the original versions of sections 2 and 3 of Canon II.6 in 1868. It added section 1 of that Canon in 1871 and section 4 in 1979 when it amended Canon I.7.

In 1979, in apparent response to that year's United States Supreme Court opinion in *Jones v. Wolf*, *supra*, 443 U.S. 595, the Episcopal Church added section 4 to Canon I.7 (Canon I.7.4), which provides: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons."

Recently, as a result of a doctrinal dispute, St. James Parish disaffiliated itself from the Episcopal Church. It appears that the dispute leading to the decision to disaffiliate arose after the national church ordained an openly gay man as a bishop in New Hampshire in 2003. Some members of the Episcopal Church, including members of St. James

Parish, disagreed with this ordination. In July 2004, the board of St. James Parish voted to end its affiliation with the Episcopal Church and to affiliate with the Anglican Church of Uganda. A majority of the congregation voted to support the decision. After the disaffiliation, a further dispute arose as to who owned the church building that St. James Parish used for worship and the property on which the building stands — the local church that left the Episcopal Church or the higher church authorities.

To resolve this dispute, the Los Angeles Diocese and various individuals, including a dissenter from the decision by St. James Parish to disaffiliate (hereafter collectively Los Angeles Diocese), sued various individuals connected with St. James Parish (defendants) alleging eight property-recovery-related causes of action. Later, the national Episcopal Church successfully sought to intervene on the side of the Los Angeles Diocese and filed its own complaint in intervention against defendants. In essence, both sides in this litigation, i.e., defendants on one side, and the Los Angeles Diocese and Episcopal Church allied on the other side, claim ownership of the local church building and property on which it stands.

The defendants moved to strike the Los Angeles Diocese's lawsuit as a SLAPP suit under Code of Civil Procedure section 425.16. The trial court granted the motion and dismissed the action without leave to amend, finding both that the action was a SLAPP suit and that the plaintiffs had not established a probability that they would prevail. The court later sustained without leave to amend defendants' demurrer to the Episcopal Church's complaint

in intervention and dismissed that action. The Los Angeles Diocese and the Episcopal Church appealed the dismissals. The Court of Appeal consolidated the appeals and reversed the judgments. That court ruled that the action was not a SLAPP suit subject to the special motion to strike, and that the higher church authorities, not defendants, own the disputed property.

We granted review to decide both whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and the merits of the church property dispute.

II. DISCUSSION

A. Special Motion to Strike Under Code of Civil Procedure Section 425.16

Before considering the merits of the property dispute, we must decide a preliminary procedural question. Subdivision (b)(1) of Code of Civil Procedure section 425.16 (section 425.16) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Defendants filed a special motion to strike under this section — a "so-called anti-SLAPP motion." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) The trial court found that section 425.16 governs the action the Los Angeles Diocese filed and, further finding the plaintiffs had not shown a probability they would prevail, granted the special motion to strike. The Court of Appeal con-

cluded that the action was not a SLAPP suit. We agree with the Court of Appeal.

"[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) Defendants argue that this action arose from their protected activity in first expressing disagreement with the higher church authorities regarding church governance and then disaffiliating from the general church.

The Los Angeles Diocese's complaint did allege facts concerning the reasons defendants decided to disaffiliate from the greater church. Nevertheless, we conclude the action did not arise from protected activity within the meaning of section 425.16. As the Court of Appeal aptly stated, "The flaw in this thinking is that it confuses the *motivation for the disaffiliation* with the claims made by the general church about the *use of church property*. [¶] . . . [I]t makes no difference *why* defendants are disaffiliating; the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by plaintiffs*."

"[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a

cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) In filing this action, the Los Angeles Diocese sought to resolve a *property dispute.* The property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is "the gravamen or principal thrust" of the action. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) The additional fact that protected activity may lurk in the background — and may explain why the rift between the parties arose in the first place — does not transform a property dispute into a SLAPP suit. Accordingly, the trial court erred in treating this as a SLAPP suit subject to section 425.16's special motion to dismiss.

B. Resolving the Dispute Over the Church Property

Both lower courts also decided the merits of the dispute over ownership of the local church — the trial court in favor of the local church and the Court of Appeal in favor of the general church. We will also decide this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to resolve the dispute of this case.

1. How California Courts Should Resolve Disputes Over Church Property

Decisions from both this court and the United States Supreme Court have made clear that, when asked to do so, secular courts may, indeed must, resolve internal church disputes over ownership of church property. As the high court put it in the seminal 19th-century case involving a church property dispute, "an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases. [¶] Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." (*Watson v. Jones* (1871) 80 U.S. 679, 714.) Similarly, in its most recent decision involving a church property dispute, the court stated, "There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." (*Jones v. Wolf*, *supra*, 443 U.S. at p. 602.) (For cases from this court, see, e.g., *Rosicrucian Fellow v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 131; *Wheelock v. First Presb. Church* (1897) 119 Cal. 477, 482.)

But when called on to resolve church property disputes, secular courts must not entangle themselves in disputes over church doctrine or infringe on the right to free exercise of religion. In this regard, the United States Supreme Court has made two

points clear: (1) how state courts resolve church property disputes is a matter of state law; but (2) the method a state chooses must not violate the First Amendment to the United States Constitution.[2] "[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. [Citations.] As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. [Citations.] Subject to these limita-tions, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" (*Jones v. Wolf*, *supra*, 443 U.S. at p. 602, quoting *Md. & Va. Churches v. Sharpsburg Ch.* (1970) 396 U.S. 367, 368 (conc. opn. of Brennan, J.).)

The high court found invalid, for example, a method used in Georgia whereby "the right to the property previously used by the local churches was made to turn on a civil court jury decision as to

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[2] As relevant here, the First Amendment to the United States Constitution (First Amendment) provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (See *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 100, fn. 5.) Although the amendment refers solely to Congress, its restraints apply to the states through the Fourteenth Amendment. (See *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 441.)

whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." (*Presbyterian Church v. Hull Church, supra*, 393 U.S. at p. 441.) The court held that "the civil courts [have] *no* role in determining ecclesiastical questions in the process of resolving property disputes." (*Id.* at p. 447.) It explained that the First Amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." (*Id.* at p. 449.) The court concluded that the "departure-from-doctrine" approach "requires the civil court to determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." (*Id.* at p. 450; see also *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 698 ["inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments"].) The court remanded the matter to the Georgia Supreme Court to develop a new method for resolving church property disputes. (*Presbyterian Church v. Hull Church, supra*, at pp. 450-452.)

The high court has approved two methods for adjudicating church property disputes. The first approach is one the court itself adopted in the 19th

century. (*Watson v. Jones*, *supra*, 80 U.S. 679.)[3] This approach is often called the "principle of government" approach. (See *Watson v. Jones*, *supra*, 80 U.S. at p. 725.) The *Watson v. Jones* court distinguished between two types of church disputes. One "has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself . . . ; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society." (*Id.* at pp. 724-725.) "In such cases," the court explained, "where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations." (*Id.* at p. 725.) Another type, which the court said "is the one which is oftenest found in the courts," involves a hierarchical structure, i.e., a "religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government." (*Id.* at p. 726.) In the latter case, the court said, "we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is

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[3] As the high court later explained, *Watson v. Jones*, *supra*, 80 U.S. 679, predated *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and, accordingly, "it was based on general federal law rather than the state law of the forum in which it was brought." (*Serbian Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at p. 710, fn. 5.)

under its government and control, and is bound by its orders and judgments." (*Id.* at pp. 726-727.)

The court adopted this test for a hierarchical church: "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." (*Watson v. Jones*, *supra*, 80 U.S. at p. 727; see also *Serbian Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. at p. 710 [quoting this language and describing it as the rule applicable to "hierarchical churches"].)

The second approach the high court has approved is what it called the "neutral principles of law" approach. (*Jones v. Wolf*, *supra*, 443 U.S. at p. 597.) The court first mentioned such a possible approach in *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. 440: "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." (*Id.* at p. 449.) A year later, in a brief per curiam opinion, the high court upheld Maryland's resolution of a church property dispute that "relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." (*Md. & Va. Churches v. Sharpsburg Ch.*, *supra*, 396 U.S. at p. 367, fn. omit-

ted.)[4] Because this approach "involved no inquiry into religious doctrine," the high court dismissed the appeal as one involving no substantial federal question. (396 U.S. at p. 368; see also *id.* at p. 370 (conc. opn. of Brennan, J.) [discussing the neutral principles approach in greater detail].)

The high court definitively approved the neutral principles approach in *Jones v. Wolf*, *supra*, 443 U.S. 595, a 1979 decision that is the high court's most recent on this subject and, hence, is of critical importance to the instant dispute. After that court had invalidated Georgia's method for resolving church property disputes (*Presbyterian Church v. Hull Church*, *supra*, 393 U.S. 440), Georgia adopted a new

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[4] Although the high court originally referred to "neutral principles of law, developed for use in all property disputes" (*Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at p. 449), it later made clear that such neutral principles may include application of statutes specifically governing religious property. (*Md. & Va. Churches v. Sharpsburg Ch.*, *supra*, 396 U.S. at p. 367; see also *id.* at p. 370 (conc. opn. of Brennan, J.).) As the high court explained in *Jones v. Wolf*, *supra*, 443 U.S. at pages 602-603, "The neutral-principles approach was approved in [*Md. & Va. Churches v. Sharpsburg Ch.*, *supra*], an appeal from a judgment of the Court of Appeals of Maryland settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, *the state statutes governing the holding of church property*, and the provisions in the constitution of the general church concerning the ownership and control of church property." (Italics added.)

A statute governing specifically church property obviously is not developed for use in all property disputes, but, as the high court has made clear, it may still be considered in applying neutral principles of law as that court defines the term. Such a statute is — or must be — neutral in the sense that it does not require state courts to resolve questions of religious doctrine.

approach. The high court considered that new approach in *Jones v. Wolf*, *supra*, 443 U.S. 595. It summarized the issue at the outset: "This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church." (*Id.* at p. 597.)

The high court reviewed three Georgia Supreme Court opinions that postdated the remand in *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. 440. It explained that after the remand, the Georgia Supreme Court "adopted what is now known as the 'neutral principles of law' method for resolving church property disputes. The [Georgia Supreme Court] examined the deeds to the properties, the state statutes dealing with implied trusts [citation], and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church." (*Jones v. Wolf*, *supra*, 443 U.S. at p. 600.) In all three of the Georgia Supreme Court cases, the deeds to the disputed property were in the name of the local church. In two of them, including the case the *Jones v. Wolf* court was reviewing, no statute or church document created a trust in favor of the general church. In those cases, the Georgia Supreme Court awarded the property to the local church. (*Id.* at pp. 600-601.) In the third case, however, involving a dispute within the United Methodist Church, the high court explained that the Georgia Supreme

Court "observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational church." (*Ibid.*, fn. omitted.)

The *Jones v. Wolf* court upheld Georgia's neutral principles approach, although it remanded the particular case to the Georgia Supreme Court for further proceedings on a narrow point irrelevant to the issue of this case.[5] It recognized advantages inherent in that approach. "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems

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[5] The Georgia Supreme Court had also resolved a dispute over which of two local factions properly represented the local church. The high court was concerned that the Georgia Supreme Court had not adequately explained its reasoning. Specifically, the Georgia Supreme Court did not explain whether it simply applied majority rule — which the high court indicated would be permissible — or whether the decision "involve[d] considerations of religious doctrine and polity" — which the high court indicated would not be permissible. (*Jones v. Wolf*, *supra*, 443 U.S. at p. 608.) The high court remanded the matter to permit the Georgia Supreme Court to articulate the reasons it concluded one particular faction represented the local church. (*Id.* at pp. 609-610.) This case presents no such issue.

in general — flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members." (*Jones v. Wolf*, *supra*, 443 U.S. at pp. 603-604.)

The court also recognized potential difficulties inherent in the neutral principles approach. "The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." (*Jones v. Wolf*, *supra*, 443 U.S. at p. 604.)

Despite these potential difficulties, the high court concluded that "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.' [Citation.] We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." (*Jones v. Wolf*, *supra*, 443 U.S. at p. 604, quoting *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at p. 449.)

Early cases from this court resolving church property disputes generally cited *Watson v. Jones*, *supra*, 80 U.S. 679, the only then existing United States Supreme Court decision on the subject. (See *Rosicrucian Fellow v. Rosicrucian Etc. Ch.*, *supra*, 39 Cal.2d at p. 131; *Committee of Missions v. Pacific Synod* (1909) 157 Cal. 105, 122; *Horsman v. Allen* (1900) 129 Cal. 131, 135; *Wheelock v. First Presb. Church*, *supra*, 119 Cal. at p. 485; *Baker v. Ducker* (1889) 79 Cal. 365, 374.) This court has not had occasion to consider the neutral principles approach in a church property case since its development.[6] The

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[6] In a case not involving a church property dispute, we described "the rule that the state must accept the decision of appropriate church authorities on . . . matters [of religious doctrine and internal church governance]" as "the rule of the so-called church property cases." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 541.) As

Courts of Appeal have, however, adopted and consistently used it. (*Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396, 1411; *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754, 762-764; *Guardian Angel Polish Nat. Catholic Church of L.A., Inc. v. Grotnik* (2004) 118 Cal.App.4th 919, 930; *Singh v. Singh* (2004) 114 Cal.App.4th 1264, 1280-1281; *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, 497-499, 503; *Protestant Episcopal Church v. Barker*, *supra*, 115 Cal.App.4th at p. 615; *Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 919-923 (*Presbytery of Riverside*); *In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850, 858-859; see also *Metropolitan Philip v. Steiger* (2000) 82 Cal.App.4th 923, 929, fn. 7 [not deciding whether the neutral principles approach is valid because the case turned on an ecclesiastical dispute requiring the court to defer to the ecclesiastical authorities].)

The Court of Appeal in this case criticized these Court of Appeal decisions for, in its view, violating principles of stare decisis. The Court of Appeal believed that early cases of this court specifically adopted the principle of government approach, thus precluding the more recent Courts of Appeal from

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Jones v. Wolf, *supra*, 443 U.S. 595, makes clear, this rule does indeed apply to church property cases even under the neutral principles approach. Because no church property dispute existed in *Catholic Charities of Sacramento, Inc. v. Superior Court*, we did not consider whether neutral principles of law can be used to resolve such disputes.

adopting the neutral principles approach. We disagree. As explained in the Court of Appeal opinion containing the most thorough examination of this question (*Presbytery of Riverside, supra,* 89 Cal.App.3d 910), the principle of government method of *Watson v. Jones, supra,* 80 U.S. 679, and the neutral principles method of *Jones v. Wolf, supra,* 443 U.S. 595, are not mutually exclusive, but can be reconciled.[7] In any event, this court unquestionably has authority to adopt the neutral principles approach.

Watson v. Jones, supra, 80 U.S. at page 727, held that secular courts must accept as binding any church adjudication regarding "questions of discipline, or of faith, or ecclesiastical rule, custom, or law . . . ." As *Jones v. Wolf, supra,* 443 U.S. 595, makes clear, this remains the rule. Secular courts may not decide questions involving church doctrine or faith. But this rule does not prevent courts from using neutral principles of law to resolve a church property dispute that does not turn on questions of church doctrine: "However, when the dispute to be resolved is essentially ownership or right to possession of property, the civil courts appropriately adjudicate the controversy even though it may arise out of a dispute over doctrine or other ecclesiastical question, provided the court can resolve the property dispute without attempting to resolve the underlying ecclesiastical controversy." (*Presbytery of Riverside,*

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[7] The opinion of *Presbytery of Riverside, supra,* 89 Cal.App.3d 910, actually predated *Jones v. Wolf, supra,* 443 U.S. 595, by a few months, but it considered the discussion of "neutral principles of law" found in *Presbyterian Church v. Hull Church, supra,* 393 U.S. 440. (*Presbytery of Riverside, supra,* at pp. 920-924 & fn. 2.)

supra, 89 Cal.App.3d at p. 920.) As the *Presbytery of Riverside* court explained, "[i]n *Watson v. Jones* the court was asked to decree the termination of an implied trust because of alleged departures from doctrine by the general church. (See *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. at p. 445.) Thus the dispute involved in the case was purely ecclesiastical." (*Id.* at p. 921.)

The *Presbytery of Riverside* court also discussed early decisions of this court and concluded that, although they cited and applied the rule of *Watson v. Jones*, *supra*, 80 U.S. 679, they do not preclude use of neutral principles of law to decide church property disputes that do not turn on questions of church doctrine. (*Presbytery of Riverside*, *supra*, 89 Cal.App.3d at pp. 922-923.) As did the court in *Protestant Episcopal Church v. Barker*, *supra*, 115 Cal.App.3d at page 614 (and implicitly the more recent Court of Appeal decisions using the neutral principles approach), we find the discussion in *Presbytery of Riverside*, *supra*, 89 Cal.App.3d 910, persuasive. Subject to the proviso that secular courts may not decide questions of church doctrine, we believe that California courts should use neutral principles of law to decide church property disputes.

Accordingly, we conclude that secular courts called on to resolve church property disputes should proceed as follows: State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of a property dispute involves a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point. But to the extent the court can resolve a property dispute

without reference to church doctrine, it should apply neutral principles of law. The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as Corporations Code section 9142. (See *Jones v. Wolf*, *supra*, 443 U.S. at p. 600 [upholding Georgia's use of such sources]; *Md. & Va. Churches v. Sharpsburg Ch.*, *supra*, 396 U.S. 367 [upholding Maryland's use of such sources]; *Protestant Episcopal Church v. Barker*, *supra*, 115 Cal.App.3d at p. 621.)

2. Resolving the Dispute of This Case

St. James Parish holds record title to the property in question. That is the fact that defendants rely on most heavily in claiming ownership. On the other hand, from the beginning of its existence, St. James Parish promised to be bound by the constitution and canons of the Episcopal Church. Such commitment is found in the original application to the higher church authorities to organize as a parish and in the articles of incorporation. Canon I.7.4, adopted in 1979, provides that property held by a local parish "is held in trust" for the general church and the diocese in which the local church is located. The same canon states that the trust does not limit the authority of the parish over the property "so long as the particular Parish . . . remains a part of, and subject to, this Church and its Constitution and Canons." Other canons adopted long before St. James Parish existed also contained substantial restrictions on the local use of church property.

The question before us is, which prevails — the fact that St. James Parish holds record title to the property, or the facts that it is bound by the constitution and canons of the Episcopal Church and the canons impress a trust in favor of the general church? In deciding this question, we are not entirely free from constitutional constraints. Once again, *Jones v. Wolf, supra*, 443 U.S. 595, is important to this question. Although that decision permitted the states to use the neutral principles approach, it also made clear that in applying that approach, state courts must neither become entangled in religious matters nor, especially important to the instant dispute, violate the First Amendment right to free exercise of religion. *Jones v. Wolf* was a five-to-four decision, with the dissent arguing that the First Amendment compels use of the principle-of-government approach of *Watson v. Jones, supra*, 80 U.S. 679 — under which the higher church authorities would necessarily win. Normally, the dissent would not be of great significance to this court, because we are bound by the majority opinion concerning federal constitutional questions. But the majority responded to some of the dissent's specific arguments. The dissent is important to give context and meaning to the majority's response.

The dissent argued that "in each case involving an intrachurch dispute — including disputes over church property — the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. . . . [B]y recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious gov-

ernance of those who have formed the association and submitted themselves to its authority." (*Jones v. Wolf, supra,* 443 U.S. at p. 618, fn. omitted (dis. opn. of Powell, J.).) The majority responded to this point, which it described as an argument "that a rule of compulsory deference is necessary in order to protect the free exercise rights 'of those who have formed the association and submitted themselves to its authority.'" (*Jones v. Wolf, supra,* at pp. 605-606.) Significantly, the majority did not deny that free exercise rights require a secular court to defer to decisions made within a religious association when local churches have submitted themselves to the authority of that association. Rather, the majority argued that the neutral principles approach is consistent with this requirement.

The dissent's argument, the *Jones v. Wolf* majority stated, "assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts,* the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be*

made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties*, provided it is embodied in some legally cognizable form." (*Jones v. Wolf, supra*, 443 U.S. at p. 606, italics added.)

Shortly after this decision, and in apparent reaction to it, the Episcopal Church added Canon I.7.4, which recites an express trust in favor of the denominational church. This occurred some 25 years before the instant dispute erupted. Defendants focus on the high court's reference to what the "parties" can do, and argue that Canon I.7.4, to be effective, had to have been enacted by the parties — in other words, that some kind of agreement must have been reached between the general church and St. James Parish (and presumably every other parish in the country) ratifying Canon I.7.4. We do not so read the high court's words. Use of the passive voice in describing the possible "alternative[]" of making the general church's constitution recite the trust suggests the high court intended that this could be done by whatever method the church structure contemplated. Requiring a particular method to change a church's constitution — such as requiring every parish in the country to ratify the change — *would* infringe on the free exercise rights of religious associations to govern themselves as they see fit. It would impose a major, not a "minimal," burden on the church governance. (*Jones v. Wolf, supra*, 443 U.S. at p. 606.)

Thus, the high court's discussion in *Jones v. Wolf, supra*, 443 U.S. at page 606, together with the Epis-

copal Church's adoption of Canon I.7.4 in response, strongly supports the conclusion that, once defendants left the general church, the property reverted to the general church. Moreover, Canon I.7.4 is consistent with earlier-enacted canons that, although not using the word "trust," impose substantial limitations on the local parish's use of church property and give the higher church authorities substantial authority over that property. For example, permitting a disaffiliating local church to take the property with it when it reaffiliates with a different church is inconsistent with the prohibition of Canon II.6, section 2, against encumbering or alienating local property without the previous consent of higher church authorities. Thus, a strong argument exists that Canon I.7.4 merely codified what had long been implicit. As we discuss below, this is the conclusion reached by some of the out-of-state decisions that awarded property to the national Episcopal Church in similar disputes.

A California statutory provision that was enacted shortly after *Jones v. Wolf*, *supra*, 443 U.S. 595, and that is consistent with the language quoted above from page 606 of that decision, also supports the conclusion that the property now belongs to the general church. As relevant, subdivisions (c) and (d) of Corporations Code section 9142 (section 9142), which were enacted in 1982 (Stats. 1982, ch. 242, § 1, p. 784), provide:

"(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless *one* of the following applies: [¶] . . .

"(2) Unless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.* [¶] . . .

"(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments *creating the trusts. . . .*" (Italics added.)

This statute appears to be the type of statute the United States Supreme Court had in mind when it approved reliance on "provisions of state statutory law governing the holding of property by religious corporations . . . ." (*Md. & Va. Churches v. Sharpsburg Ch.*, *supra*, 396 U.S. at p. 367, fn. omitted.) Justice Brennan fleshed out the point in his concurring opinion in that case. He explained that one possible approach to resolving church property disputes "is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." (*Id.* at p. 370 (conc. opn. of Brennan, J.).) Section 9142, subdivisions (c) and (d), does not permit state interference in religious doctrine and leaves control of ecclesiastical policy and doctrine to the church. Subdivision (c) of that section permits the governing instruments of the general church to create an express trust in church property, which Canon I.7.4 does. Subdivision (d) permits changing a trust, but only if done in the instrument that *created* it. Canon I.7.4 has not been amended. So it would appear that

this statute also compels the conclusion that the general church owns the property now that defendants have left the general church.

Defendants argue that section 9142 states only a negative conditional, not a positive imperative. In other words, in their view, the statutory provisions are *minimum* requirements for impression of a trust on local religious property, and do not necessarily exclude other requirements therefor. Defendants focus on the grammatical construction of subdivision (c), and its repeated use of the word "unless." As defendants would have it, there is *never* a trust "unless" one of the statutory provisions is present, but this does not mean there is *always* a trust when one or more of the provisions *is* present. But this interpretation overlooks subdivision (d) of section 9142. That subdivision provides that "[t]rusts *created by* paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments *creating the trusts*. . . ." (Italics added.) Thus, subdivision (d) appears clearly to indicate that, under California law, a trust *is created* by compliance with any one of the alternatives set forth in subdivision (c)(2), and it can only be altered or dissolved by amending the creating instrument.

In short, St. James Parish agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments. Those instruments make clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church. Respect for the

First Amendment free exercise rights of persons to enter into a religious association of their choice, as delineated in *Jones v. Wolf*, *supra*, 443 U.S. 595 (as well as the provisions of section 9142) requires civil courts to give effect to the provisions and agreements of that religious association. To adapt a similar conclusion in a recent Court of Appeal decision involving a different religious association, "In summary, [St. James Parish] is bound by the constitution, laws, rules and regulations of the [Episcopal Church]. Historically, it has accepted the authority of the national church and submitted itself to the national church's jurisdiction." (*Guardian Angel Polish Nat. Catholic Church of L.A., Inc. v. Grotnik*, *supra*, 118 Cal.App.4th at p. 929; see also *Korean United Presbyterian Church v. Presbytery of the Pacific*, *supra*, 230 Cal.App.3d 480 [reaching a similar conclusion regarding a different religious association based in part on section 9142 and a general church's constitutional provision comparable to Canon I.7.4].)

This conclusion is bolstered by a review of out-of-state cases that involved similar church property disputes within the Episcopal Church and that, with near unanimity, awarded the disputed property to the general church when a local church disaffiliated itself from that general church. A typical case, and one cited in some of the later cases, is *Rector, Wardens v. Episcopal Church* (Conn. 1993) 620 A.2d 1280. In that case, the court reviewed the history of the Episcopal Church. It concluded that a local church that had withdrawn from the general Episcopal Church, as well as the local church's predecessors, "had agreed, as a condition to their formation as ecclesiastical organizations affiliated with the

Diocese and [the Episcopal Church], to use and hold their property only for the greater purposes of the church." (*Id.* at p. 1292.) Specifically, it found that Canon I.7.4 (which it called the "Dennis Canon"), "adopted in 1979 merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the Episcopal Church] in 1789." (*Ibid.*) Accordingly, it found "a legally enforceable trust in favor of the general church in the property claimed by the [local church]." (*Id.* at p. 1293.)

Other Episcopal Church cases reaching similar conclusions include *Bishop and Diocese of Colorado v. Mote* (Colo. 1986) 716 P.2d 85; *Episcopal Diocese of Mass. v. Devine* (Mass.App.Ct. 2003) 797 N.E.2d 916 (relying on Canon I.7.4 and the fact the local church had agreed to accede to the general church's canons); *Bennison v. Sharp* (Mich.Ct.App. 1983) 329 N.W.2d 466; *Protestant Episc. Church, etc. v. Graves* (N.J. 1980) 417 A.2d 19; *The Diocese v. Trinity Epis. Church* (App.Div. 1999) 684 N.Y.S.2d 76, 81 ("[T]he 'Dennis Canon' amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church," citing *Rector, Wardens v. Episcopal Church, supra*, 620 A.2d 1280); *Daniel v. Wray* (N.C.Ct.App. 2003) 580 S.E.2d 711 (relying on Canon I.7.4); *In re Church of St. James the Less* (Pa. 2005) 888 A.2d 795 (relying on Canon I.7.4 and citing *Rector, Wardens v. Episcopal Church, supra*, 620 A.2d 1280). The court in *Bjorkman v. Protestant Episcopal Church* (Ky. 1988) 759 S.W.2d 583 awarded the property to the local church, but there the dispute arose before the high

court decision of *Jones v. Wolf, supra*, 443 U.S. 595, the opinion did not mention Canon I.7.4, and the decision has not been followed by other jurisdictions. These out-of-state decisions are not binding on this court, but we find them persuasive, especially in the aggregate.

Defendants rely in part on *Protestant Episcopal Church v. Barker, supra*, 115 Cal.App.3d 599, the only reported California case involving a property dispute within the Episcopal Church. In that case, four local churches in Los Angeles disaffiliated from the general Episcopal Church. The Court of Appeal, over a dissent, awarded the disputed property to three of the local churches and to the general church regarding the fourth local church. The factual difference that caused the different results was that the three churches were incorporated before, and the fourth after, a particular canon of the Los Angeles Diocese was adopted. The dissent would have awarded all of the disputed property to the general church. We need not decide whether the majority decision was correct based on the specific record before it and the state of the law at the time, for it is distinguishable, largely due to the passage of time. In that case, the dispute arose and, indeed, the trial court judgment was rendered before (1) the decision in *Jones v. Wolf, supra*, 443 U.S. 595, (2) the Episcopal Church adopted Canon I.7.4, and (3) the Legislature enacted section 9142, subdivisions (c) and (d). The appellate court in *Barker* did not mention any of the general church's canons. Accordingly, that decision does not control a dispute that, here, arose 25 years after the high court decision and the adoption of Canon I.7.4. We note that several of the out-of-

state cases discussed above cite, but do not follow, *Protestant Episcopal Church v. Barker*, *supra*, 115 Cal.App.3d 599.[8]

Defendants also cite *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church*, *supra*, 121 Cal.App.4th 754 (*St. Luke's*), which interpreted section 9142. The court in that case concluded that there had been a trust in favor of the general church, but that the deeds to the local property and the local church's articles of incorporation, not the general church's governing instruments, created the trust. (See *St. Luke's*, *supra*, at p. 770 ["The Book of Discipline [i.e., the general church's governing instrument] did not, by itself, 'create' the trust."].) Accordingly, it concluded that the local church could, and did, revoke the trust. (*Id.* at p. 771.) We need not decide whether *St. Luke's* was correct on its facts because, assuming its conclusion was factually correct, the decision is distinguishable. Here, the general church's canons, not instruments of the local church, created the trust. The language of section 9142, subdivision (d), requires any revocation of that trust to exist in the document that created it. So, assuming the local church in *St. Luke's* may have been able to revoke the trust of that case, nothing in section 9142 or the governing instruments of the Episcopal

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[8] See *Bishop and Diocese of Colorado v. Mote*, *supra*, 716 P.2d at pages 108-109; *id.*, footnote 17 ("[W]e find the holding in *Barker* inapplicable and decline to follow it"); *Rector, Wardens v. Episcopal Church*, *supra*, 620 A.2d at page 1285 ("declin[ing] to follow" *Barker*); *Episcopal Diocese of Mass. v. Devine*, *supra*, 797 N.E.2d at page 924, footnote 21; *Bennison v. Sharp*, *supra*, 329 N.W.2d at pages 473-474.

Church suggests that defendants may do so in this case.

The *St. Luke's* court also stated that "subdivision (c)(2) of Corporations Code section 9142 does not authorize a general church to create a trust interest for itself in property owned by a local church simply by issuing a rule declaring that such a trust exists . . . ." (*St. Luke's*, *supra*, 121 Cal.App.4th 754, 757.) As a general proposition, this statement is inconsistent with section 9142, subdivision (c)(2)'s plain language, and we disapprove it. Instead, we agree with the assessment of the Court of Appeal in this case: "[I]n a hierarchically organized church, the 'general church' *can* impress a trust on a local religious corporation of which the local corporation is a 'member' *if* the governing instruments of that superior religious body so provide."

Defendants argue that such a reading of section 9142 "would unconstitutionally promote and establish denominational religion." We need not, indeed, cannot consider all possible applications of section 9142, but as applied here, the section is fully consistent with *Jones v. Wolf*, *supra*, 443 U.S. at page 606, and promotes the free exercise rights of persons to form and join a religious association that is constructed and governed as they choose. Defendants also suggest that the Episcopal Church did not properly adopt Canon I.7.4 under its own rules. It is a bit late to argue that Canon I.7.4 was not effectively adopted, a quarter of a century later, and, in light of the consistent conclusions of the out-of-state cases that that canon is, indeed, part of the Episcopal Church's governing documents, the argument seems dubious at best. But, in any event, this is one of

those questions regarding "religious doctrine or polity" (or, as we phrased it in *Catholic Charities of Sacramento, Inc. v. Superior Court*, *supra*, 32 Cal.4th at page 541, "religious doctrine and internal church governance") on which we must defer to the greater church's resolution. (*Jones v. Wolf*, *supra*, 443 U.S. at p. 602.) Over the years, the Episcopal Church has consistently taken the position that Canon I.7.4 was effectively adopted.

Defendants also rely on Evidence Code section 662, which provides, "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." We need not decide how or whether this statute interacts with the more specific section 9412 (or the First Amendment constraints that exist in this case), because, as the Court of Appeal noted, "particularly when read in conjunction with section 9142, canon I.7.4 *is* clear and convincing evidence rebutting any presumption that the beneficial interest in the local church property is solely controlled by the local parish corporation."

Defendants state that, over the years, St. James Parish "purchased additional parcels of property in its own name, with funds donated exclusively by its members." They contend that it would be unjust and contrary to the intent of the members who, they argue, "acquired, built, improved, maintained, repaired, cared for and used the real and personal property at issue for over fifty years," to cause the local parish to "los[e] its property simply because it has changed its *spiritual* affiliation." But the matter is not so clear. We may assume that St. James Par-

ish's members did what defendants say they did for all this time. But they did it for a local church that was a constituent member of a greater church and that promised to remain so. Did they act over the years intending to contribute to a church that was part of the *Episcopal Church* or to contribute to St. James Parish even if it later joined a different church? It is impossible to say for sure. Probably different contributors over the years would have had different answers if they had thought about it and were asked. The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.

For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church. As stated in one of the out-of-state cases involving the same Episcopal Church, "[t]he individual defendants are free to disassociate themselves from [the parish and the Episcopal Church] and to affiliate themselves with another religious denomination. No court can interfere with or control such an exercise of conscience. The problem lies in defendants' efforts to take the church property with them. This they may not do." (*Protestant Episc. Church, etc. v. Graves*, *supra*, 417 A.2d at p. 25.)

III. CONCLUSION

We affirm the judgment of the Court of Appeal.

CHIN, J.

WE CONCUR:

GEORGE, C.J.
BAXTER, J.
WERDEGAR, J.
MORENO, J.
CORRIGAN, J.

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

I agree with the majority that the Protestant Episcopal Church in the United States of America (Episcopal Church) owns the property to which St. James Parish in Newport Beach (St. James Parish) has held title since 1950. This conclusion is compelled by Corporations Code section 9142, subdivision (c)(2). But I disagree with the majority that this provision, which applies only to religious corporations, reflects a "neutral principles of law" approach.

I

St. James Parish began in 1947 as a mission of the Episcopal Church. In 1949, it incorporated and became a parish of the Episcopal Church. Since 1950, the parish has held the deed to the property on which the parish's church building stands. Ownership of the property is at issue here.

In 1979, the Episcopal Church added section 4 to its Canon I.7 to provide that all property held by any of its parishes is held in trust for the Episcopal Church. In 2004, St. James Parish ended its affiliation with the Episcopal Church, and it amended its articles of incorporation to delete any reference to the Episcopal Church.

Thereafter, the Episcopal Church, its Los Angeles Diocese, and a congregation member who voted against the decision of the parish to disaffiliate brought these actions, asserting that the property at issue was being held in trust for the Episcopal Church. The trial court ruled for St. James Parish; the Court of Appeal reversed. This court granted review.

II

The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304), states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Because of the risks of inhibiting the free development of religion and entangling secular interests in ecclesiastical concerns, the "First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." (*Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 449.) In this regard, the United States Supreme Court has identified two constitutionally permissible approaches that civil courts may use when called upon to resolve disputes relating to church property.

One is the "principle of government" approach: When the dispute involves a hierarchical church, as here the Episcopal Church, civil courts must accept decisions made at the highest level of the church hierarchy. (*Watson v. Jones* (1871) 80 U.S. 679, 727.)

The other is the "neutral principles of law" approach. That concept, as used in the context of a civil court's resolution of church property disputes, simply permits application of "objective, well-established concepts of trust and property law familiar to lawyers and judges." (*Jones v. Wolf* (1979) 443 U.S. 595, 603.) These are "principles or rules of law 'developed for use in all property disputes' whether or not the litigants are religious associations or corporations." (*Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 923, fn. 2.)

The United States Supreme Court has left it to the states to decide which approach to adopt. (*Jones v. Wolf, supra,* 443 U.S. at p. 602.)

In 1982, the California Legislature amended Corporations Code section 9142 by adding, as relevant here, subdivision (c)(2). That provision permits the assets of a religious corporation to be made subject to a trust when "the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide." Thus, as the majority notes (maj. opn., *ante,* at pp. 23-24), through legislative fiat a "superior religious body or general church" may *unilaterally* create trusts in its favor over property held by the smaller church that was a member of the general church when the trust was created. That occurred here when in 1979 the Episcopal Church added section 4 to its Canon I.7 to unilaterally provide that all property held by any parish is held in trust for the Episcopal Church.

Applying California's statute in resolving church property disputes, the majority concludes that the Episcopal Church now is the owner of the St. James Parish property in question. I agree.

But that conclusion is not based on neutral principles of law.[1] No principle of trust law exists that

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[1] In footnote 4, page 13, the majority asserts that neutral principles of law "include application of statutes specifically governing religious property." I disagree. In the United States Supreme Court's usage, neutral principles of law refer to laws that apply in the same way regardless of whether property is church property. (*Jones v. Wolf, supra,* 443 U.S. at p. 603 [The neutral-principles approach "relies exclusively on objective,

would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner. (*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754, 769.) If a neutral principle of law approach were applied here, the Episcopal Church might well lose because the 1950 deed to the disputed property is in the name of St. James Parish,[2] and the Episcopal Church's 1979 declaration that the parish was holding the property in trust for the Episcopal Church is of no legal consequence.

But under the principle of government approach, the Episcopal Church wins because that method makes the decision of the highest authority of a hierarchical church, here the Episcopal Church, binding on a civil court. This result is constitutional, but only because the dispute involves religious bodies and then only because the principle of government approach, permissible under the First Amendment, allows a state to give unbridled deference to the superior religious body or general church.

In my view, Corporations Code section 9142 reflects the principle of government approach. That statute allows a hierarchical church, such as the Episcopal Church here, through its bylaws to unilaterally impose a trust on the property of a local member parish. The statute does not state a neutral

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well-established concepts of trust and property law familiar to lawyers and judges"].)

[2] "The owner of the legal title to property is presumed to be the owner of the full beneficial title." (Evid. Code, § 662.)

principle of law; rather, it creates a special principle applicable solely to religious corporations.

KENNARD, J.

APPENDIX B
COURT OF APPEALS DECISION

Filed 6/25/07

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EPISCOPAL CHURCH CASES	)	G036096, G036408 and G036868 (JCCP No. 4392) OPINION

Appeals from judgments of the Superior Court of Orange County, David C. Velasquez, Judge. Both judgments reversed.

Holme Roberts & Owen, John R. Shiner, Brent E. Rychener; Horvitz & Levy, Frederic Cohen and Jeremy Rosen for Plaintiffs and Appellants.

Goodwin Procter, David Booth Beers, Heather H. Anderson and Matthew J. Wilshire for Intervener and Appellant.

Payne & Fears, Eric C. Sohlgren, Benjamin A. Nix and Daniel F. Lula for Defendants and Respondents.

Law Offices of George S. Burns, George S. Burns and John C. Ashby as Amici Curiae for the Presbyterian Church (U.S.A.), The Synod of Southern California and Hawaii, and Presbytery of Hanmi on behalf of Plaintiffs and Appellants.

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I. SUMMARY

This appeal stems from a classic dispute over church property where a local congregation of a general church seeks to disaffiliate itself from that general church and take the local church property with it. (See generally *Baker v. Ducker* (1889) 79 Cal. 365 (*Baker*); *N. L. Wheelock v. First Presbyterian Church of Los Angeles* (1897) 119 Cal. 477 (*Wheelock*); *Horsman v. Allen* (1900) 129 Cal. 131 (*Horsman*); *Committee of Missions v. Pacific Synod* (1909) 157 Cal. 105 (*Committee of Missions*); see also *Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church* (1952) 39 Cal.2d 121 (*Rosicrucian Fellowship*); *Providence Baptist Church v. Superior Court* (1952) 40 Cal.2d 55 (*Providence Baptist*).)

But this appeal is about more than a church property dispute. It is also about the rule of stare decisis. As we shall explain below, in no less than six California Supreme Court opinions, our state's highest court, taking its cue from the United States Supreme Court decision in *Watson v. Jones* (1871) 80 U.S. 679 (*Watson*), consistently used a "principle of government" or "highest church judicatory" approach to resolve disputes over church property, an approach it applied to hierarchically organized

churches and non-hierarchically organized churches alike.

However, in 1979, a panel of the intermediate California Court of Appeal came to the belief that this line of consistent California Supreme Court cases should be ignored, and that a new approach, called "neutral-principles analysis" was the appropriate California common law approach to church property disputes. (*Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910 (*Church of Palm Springs*). Neutral principles is a four-factor analysis for use in church property disputes, that typically examines (1) title, (2) articles of incorporation, (3) a church's constitution, canons and rules, and (4) state statutes.

The *Church of Palm Springs* court came to its conclusion based on its reading of a quartet of United States Supreme Court cases decided in the previous decade. (See *Presbyterian Church* v. *Hull Church* (1969) 393 U.S. 440 (*Hull Church*); *Eldership v. Church of God at Sharpsburg* (1970) 396 U.S. 367 (*Eldership*); *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 (*Serbian Orthodox*); and *Jones v. Wolf* (1979) 443 U.S. 595 (*Jones*).

In this opinion we shall explain in detail why those federal high court opinions did *not overrule* (either expressly or impliedly), or even alter in any way, the existing common law approach used by the California Supreme Court in *Baker*, *Wheelock*, *Horsman*, *Committee of Missions*, *Rosicrucian Fellowship*, or *Providence Baptist*. In this opinion we shall refer to these cases collectively as the "*Baker-Wheelock* line."

Another panel of California's intermediate appellate court followed *Church of Palm Springs* in the case of *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker* (1981) 115 Cal.App.3d 599 (*Barker*). The *Barker* court, however, did not independently examine the United States Supreme Court authorities which the *Church of Palm Springs* court had cited as authority to ignore the *Baker-Wheelock* line, or the *Church of Palm Springs'* reading of the California Supreme Court cases, particularly *Wheelock*. The *Barker* court simply assumed that the *Church of Palm Springs* decision had been correct in upsetting the stable legal universe that existed in California up until that time in the name of "neutral principles."

Thereafter, California intermediate appellate courts have given lip service to "neutral principles," but have come to results that are sometimes difficult, if not impossible, to reconcile with each other. In *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480 (*Korean United*)[1] and *Guardian Angel Polish National Catholic Church v. Grotnik* (2004) 118 Cal.App.4th 919 (*Guardian Angel*) the Court of Appeal applied the "neutral principles" approach to reach a result identical with what the traditional "principle of government" approach would have required, i.e., upholding the property claim of a general church. On the other

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[1] *Korean United* was overruled on another point in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, footnote 11. The point on which it was overruled is consideration by an appellate court of an appeal from severed issues without a final judgment, a subject that has nothing to do with religious property disputes.

hand, in *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754 (*California-Nevada*), the court reached an opposite result (and also acknowledged that it could not be reconciled with *Guardian Angel*).

This case is also about statutory construction. In 1982, that is -- after the consistent *Baker-Wheelock* line and after *Church of Palm Springs* and *Barker* -- the Legislature, by passing Senate Bill 1178 (1981-1982 Reg. Sess.), added subdivisions (c) and (d) to Corporations Code section 9142[2] involving trusts on property held by religious corporations.

An examination of the history of Senate Bill 1178 shows that the Legislature had no intention of overturning or even changing the *Baker-Wheelock* line, or codifying *Barker* or *Church of Palm Springs*, as the *California-Nevada* court would later surmise. Rather, the expressed intent of the Legislature was to "fill a void" (the phrase consistently found in the legislative history) created by earlier legislation, Senate Bill 1493 (1979-1980 Reg. Sess.) in 1981, which, while it had stripped the California Attorney General of the ability to enforce trusts against religious corporations, left no one else with the ability to enforce such trusts.

In fact, an examination of the plain language of (then newly-added) subdivisions (c) and (d) to section 9142 shows a *consistency* with the *Baker-Wheelock* line, as long as (to use the statutory phrases) a "general church" has a "governing instrument" that "ex-

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[2] All references in this opinion to section 9142 will be to the Corporations Code.

pressly" provides for a trust against the property of a local church corporation which is a "member" of that general church.

Since, in the case before us, the general church *does* have a governing instrument so providing an express trust on the property of local parish corporations who are members of the general church, we are, in this opinion, spared the issue of any arguable conflict between the *Baker-Wheelock* line and the statute. (This issue might arise in a case where, say, a hierarchically organized church did not have a governing instrument "expressly" declaring a trust, but where it asserted such a trust some other way). In this case, the common law rule of the former and the plain language of the latter dovetail to require the same result.

And finally, this case is about anti-SLAPP motions.[3] In procedural terms, part of this appeal arises out of a dismissal, pursuant to an anti-SLAPP motion, of a lawsuit brought by the diocese of a general church against a disaffiliating local church corporation that had been a member of the general church. It is now well-established in California that anti-SLAPP motions are tested by a two-prong process, in which the court must first look at (1) whether the motion even qualifies for anti-SLAPP treatment, and (2) the merits. Readers by this point will have already grasped that the trial court erred as to (2). But we also explain that it erred as to (1) as well.

In a word, the lawsuit brought by the plaintiff general church is a property dispute -- basically over

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[3] See section 425.16 of the Code of Civil Procedure. SLAPP is an acronym for Strategic Lawsuit Against Public Participation.

who controls a particular church building in Newport Beach -- and does not arise out of some desire on the part of the general church to litigate the free exercise rights of the local congregation. They are free to disaffiliate just so long as they do not try to take the parish property with them. Readers will look in vain in this opinion for any indication of what religious controversy may have prompted the disaffiliation. We may easily reach the merits of the case under both the "principle of government" standard of the *Baker-Wheelock* line, and the plain language of section 9142, without ever needing to mention the reason for the defendants' disaffiliation. That controversy is irrelevant to this action.

II. FACTS AND BACKGROUND

St. James Parish in Newport Beach began as a "mission" of the Episcopal Church in 1947. In requesting permission to upgrade the parish's status from a "mission" to a full-fledged church, the founding members promised to be bound under the "Ecclesiastical authority of the Bishop of Los Angeles, and his successors in office, the Constitution and Canons of the Church now known as the Protestant Episcopal Church in the United States of America."

As a full-fledged church, it was incorporated in 1949. The articles of incorporation expressed this purpose: "To establish and maintain a Parish which shall form a constituent part of the Diocese of Los Angeles in that branch of the Holy Catholic Church now known as the Protestant Episcopal Church in the United States of America."

Under the canons of the Los Angeles Diocese of the Episcopal Church, each parish elects a board of

directors known as the "vestry" for the local corporation.

In 1958, the canons of the Los Angeles Diocese also provided that all property held by each parish would revert back to the Diocese upon dissolution of the parish.

In 1979, the Episcopal Church enacted Canon I.7(4), which provides that "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located."

In 2004, the board of St. James Parish voted to cease all affiliation with the Episcopal Church. They amended the articles of incorporation to delete all references to the Episcopal Church. A majority of the congregation voted to support the decision, but a minority of 12 members voted against it. The Los Angeles Diocese appointed a new rector and requested that the board surrender the parish property. The board refused.

The Bishop of the Los Angeles Diocese, together with at least one of the 12 members voting against disaffiliation (Rasmussen), then filed this lawsuit in Orange County Superior Court against the rector leading the disaffiliation (Bunyan) and members of the board, alleging eight property-recovery-related causes of action. Also, the national Episcopal Church successfully sought leave to intervene in the case, and filed its own complaint in intervention.

To be sure, the original and first amended complaint and complaint in intervention in this case have included a great deal of what in story writing is known as "local color," that might make the case

seem as if it arose from a particular theological controversy. However, one could blue pencil all of that background detail out of the complaints and they would still stand on their own: The Diocese claims that the property is held in trust for *it*, the national church supports the claim, and the local church rejects it.

After a first-amended complaint the defendants soon brought an anti-SLAPP motion to dismiss the case, which was granted. In the wake of the successful anti-SLAPP motion brought against the diocese's action, the court also sustained a demurrer to the national church's (by then amended) complaint in intervention. Appeals from both dismissals followed, which this court has consolidated on its own motion.

III. THE FIRST ANTI-SLAPP PRONG

It is remarkable that the diocesan complaint in this case should come to this intermediate appellate court on a dismissal from an anti-SLAPP motion, as distinct from, say, a motion for summary judgment or trial. It seems safe to say that church property disputes are not the typical anti-SLAPP case. We are thus required to deal with the propriety of treating the diocesan complaint as a SLAPP suit before we address the merits of the property dispute (which we would be required to do in any event in the context of reviewing the propriety of the sustained demurrer to the national church's complaint in intervention).

The first prong in anti-SLAPP analysis is to determine "whether the defendant has made a threshold showing that the challenged cause of action is

one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

The theory behind the local church's prosecution of an anti-SLAPP motion is that the local church is, in essence, the object of litigation (the "strategic lawsuit" part of an anti-SLAPP motion) because of its theological differences with the diocese (and by extension, the national general church). The flaw in this thinking that it confuses the *motivation for the disaffiliation* with the claims made by the general church about the *use of church property*.

As the diocese points out in its briefing, it makes no difference *why* the defendants are disaffiliating, the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by the plaintiffs*. The fact that a religious controversy may have prompted the dispute over the right to control the property does not mean the defendants are being sued for the "protected activity" of changing their religion.

To illustrate: Suppose a married couple owning a house as community property were to split up because the husband suddenly decided to change religions. Would the wife's ensuing petition for dissolution be a "SLAPP" suit because her claims to her community share of the house could be traced to her displeasure with her husband's new-found religion? Hardly.

Or, to use another example, (this one based on an example from the diocese's appellants' brief): What if this case had arisen because the board of the local church had wanted to sell the property to a warehouse department store and, for all we know, donate the proceeds to the general church? Surely the issue

of who actually *controlled* the parish property could still be asserted in a normal civil suit -- in our hypothetical, for example, the diocese or national church might prefer the parish property in its traditional use as distinct from the money from the sale, and still assert whatever legal or equitable rights it might have in favor of that traditional use.

Prong one is measured by whether "protected activity" is the "gravamen or principal thrust" of the complaint. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) This complaint could stand alone as a simple dispute over who controls certain real property, and hence does not implicate any protected activity on the part of the local church. The trial court therefore erred in concluding that the first prong was satisfied.

IV. THE SECOND ANTI-SLAPP PRONG AND THE MERITS OF THE COMPLAINT IN INTERVENTION

If the trial court had not erred on the first prong in finding that the plaintiffs' lawsuit qualified for anti-SLAPP treatment, it presumably would have stopped there and denied the motion. It would not then have proceeded to the second prong and determined that plaintiffs' lawsuit was susceptible to dismissal on the merits.

We cannot stop with prong one, however. The propriety of the sustaining of the demurrer to the national church's complaint in intervention depends solely upon the merits of the case. We now turn to the relevant authorities that govern the issue of dis-

putes over church property in California. We will examine them in chronological order.

A. *The Law, Pre-Watson*

The law prior to the 1871 decision of the United States Supreme Court in *Watson, supra*, 80 U.S. 679 is of more than academic interest in this case, because the 1969 decision of the United States Supreme Court in *Hull Church*, and the 1981 decision of the intermediate California Court of Appeal in *Barker* would both be, in part, animated by a rejection of *that* law.

To be more specific, early 1800's decisions over church property in England developed an "implied trust" theory, which is usually attributed to then Chancellor, Lord Eldon. (See Note, *Judicial Intervention in Disputes Over the Use of Church Property* (1962) 75 Harv. L. Rev. 1142, 1145-1146.) Lord Eldon's implied trust theory required the court to decide the "nature of the original institution and the standard of faith it represented." (*Id.* at p. 1146.) The idea behind Lord Eldon's implied trust theory sought to most closely approximate the disposition of the property with the original intent of the donor: "Since the identity or character of a church was, he felt, embodied in the doctrines and usages believed and practiced by its founders, to allow a body of worshippers to change its doctrine and yet retain control of its property would be tantamount to allowing a trust for the benefit of A to be diverted to B." (*Ibid.*)

Lord Eldon's implied trust theory would be later described by the *Hull Church* court as a "departure-from-doctrine" approach. (*Hull Church, supra*, 393 U.S. at p. 443, fn. 2; 449-450.)

Its flaw was pretty obvious: Given the First Amendment and the establishment clause, requiring civil courts to divine what was the "true" original doctrine of a given religion and then determine whether some development represented a departure from that true doctrine was simply untenable. Which brings us to *Watson*.

B. *Watson*

The United States Supreme Court was able to weigh in on the issue in *Watson*, a case arising out of a split in a Louisville, Kentucky, Presbyterian Church over slavery during the Civil War. Title to the property was held in the name of the trustees of the local church, and the general Presbyterian Church had recently required ministers in southern states to publicly oppose slavery. A pro-slavery minority, however, elected their own trustees and physically seized control of the property. When members of the anti-slavery faction sued, the Kentucky state court reasoned that the public anti-slavery opposition required of southern ministers was contrary to a provision in the constitution of the Presbyterian Church prohibiting intermeddling in civil affairs. The case eventually made its way to the United States Supreme Court based on diversity jurisdiction.

The court classified religious property disputes into three categories: (1) Where the property is held in express trust. (2) Where the property is held by a "religious congregation" that is "independent," owing "no fealty or obligation to any higher authority." And (3) Where the property is held by a "religious congregation or ecclesiastical body" which is a "subordinate member of some general church organiza-

tion in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." (*Watson, supra*, 80 U.S. at p. 722.)

The *Watson* court then articulated and applied what may accurately be called the "principle of government" or "highest judicator[y]" rule for disputes. (See *Watson, supra*, 80 U.S. at pp. 725-727.) In a passage that would be quoted numerous times later, including by the California State Supreme Court, the *Watson* court said: "In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies *to the use of the property* must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property." (*Ibid.*, italics added.)

By contrast, in a hierarchically organized church such as the one involved in the case before it (the court had just enumerated the various levels of organization in the Presbyterian Church) the *Watson* court said: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the *highest of these church judicatories to which the matter has been carried*, the legal tribunals must accept such decisions as final, and as bind-

ing on them, in their application to the case before them." (*Watson, supra*, 80 U.S. at p. 726, italics added.)

Because reference to the "highest . . . judicatories" of the church at issue in *Watson* proved the dispositive rule, the *Watson* approach is often seen as synonymous with the "hierarchy theory." (See *Barker, supra*, 115 Cal.App.3d at pp. 611-613.)

But we hasten to add that the "hierarchy" description is a technical misnomer. As the passage just quoted about majority rule shows, *Watson's* "principle of government" is in point of fact neutral toward any kind of church organization. It simply makes the decision turn upon the structure of governmental organization in a church, as distinct from some other criterion.

The *Watson* court also made very clear that its "highest judicator[y]" approach was "otherwise" from Lord Eldon's implied trust approach. (*Watson, supra*, 80 U.S. at p. 727.) But that was to be expected given the First Amendment. The court said in America people are free to "organize voluntary religious associations" and "It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." (*Id.* at pp. 727-729.)

At the time of the *Watson* decision, the federal First Amendment had not been made binding on the states, so the *Watson* decision could not make law for the entire country (a point that will become important when we get to the *Hull Church* case decided

about 100 years later). However, its persuasive force clearly influenced the common law of California, as articulated by the California Supreme Court, to whose decisions we now turn.

C. *The California Supreme Court Cases*

1. Baker

Just because a majority of a local congregation changes beliefs doesn't mean the property can change in use: That is the lesson of *Baker, supra,* 79 Cal. 365.

In *Baker*, a congregation of the Reformed Church incorporated as the First Reformed Church of the City Stockton. The articles of incorporation of the new church included a direct reference to the "Heidelberg Catechism." (*Baker, supra*, 79 Cal. at p. 373.)

The corporation owned some land used as a parsonage. By the late 1880's, however, it appears that the majority of the members of the congregation had gone over to the Lutheran persuasion. (*Baker, supra*, 79 Cal. at p. 374 ["the defendants, even though they constituted a majority of the members"].) So the corporation's trustees changed the name of the corporation to the German Lutheran Zion Society, and used the parsonage for Lutheran ministers.

The remnant Reformed Church members sued to recover the property and the California Supreme Court affirmed a judgment in their favor. The court noted that the church property was originally dedicated to the use of the Reformed Church, that it was held in trust by the corporation's trustees, and the trustees had no power to change its original purpose. "It is thus made clear that the property in question

was held by the Reformed Church in trust for its members, and the defendants, even though they constituted a majority of the members, had no right and no power to divert it to the use of another and different church organization." (*Id.* at p. 374.) That is, there was no ipso facto doctrine of majority rule, or of corporate qua corporate control.

2. Wheelock

While *Baker* had only adumbrated the idea that local congregations who were members of a general church could not necessarily claim control of local church property based on title being in a local church corporation. The point would become explicit in *Wheelock, supra*, 119 Cal. 477, which fully embraced *Watson's* principle of government approach.

There, a dispute arose in the First Presbyterian Church of Los Angeles, which had been incorporated, as to where to spend the proceeds from a real estate sale -- location A or location B. The *corporation's trustees* followed the majority of the congregation and wanted location A. The supporters of location B took their case to a *church tribunal* within the Presbyterian Church -- one that the Supreme Court in its opinion would acknowledge as having "control and supervision of the Presbyterian Churches of the city of Los Angeles." (*Wheelock, supra*, 119 Cal. at p. 479.) The church tribunal partially sided with the supporters of location B, and ordered the First Presbyterian Church of Los Angeles split into two churches, with an equitable division of the fund by a commission. (The commission chose to apportion the money based on membership numbers.)

The supporters of location A didn't like the result, and refused to pay over any money. The supporters of location B went to court for their share under the tribunal's ruling, on the theory that they were enforcing a trust against the First Presbyterian Church of Los Angeles in favor of the new church at location B. They lost on demurrer and their appeal reached the state supreme court.

The Supreme Court began with the premise that civil courts had ultimate authority over the division of the money: "It may be conceded, for the purposes of the case, that neither the Presbytery nor the commission appointed by it had the power to divide and apportion the money held by the church corporation; and that the disposition of those moneys were matters for civil courts, and that ecclesiastical decrees bearing upon such disposition are not binding upon judicial tribunals." (*Wheelock, supra,* 119 Cal. at p. 482.)

But then the high court immediately shifted gears, and noted that the decrees of the internal church tribunal *were* binding on the *incorporated* First Presbyterian Church of Los Angeles "as an ecclesiastical body": "But the ecclesiastical court known as the Presbytery had the power to deal with the First Presbyterian Church in all matters ecclesiastical. The church as an ecclesiastical body was under the absolute control and dominion of the Presbytery, and the decisions and decrees of that body were as binding upon it as the decisions and decrees of this court are binding upon inferior judicial tribunals." (*Wheelock, supra*, 119 Cal. at p. 482.)

Then came the punch line, in which the court explicitly used a principle of government approach:

"Those decrees are not only binding upon the church as an ecclesiastical body, *but they are binding and conclusive upon courts wherever and whenever material to pending litigation.*" (*Wheelock, supra*, 119 Cal. at p. 482, italics added.)

That meant that the courts had to follow the rulings of the church tribunal as to the use of the property, even if supporters of location A -- who, we must remind readers, controlled the corporation -- didn't like its ruling. (*Wheelock, supra*, 119 Cal. at p. 482.) "It is apparent that many members were grieved at such results and deemed the treatment harsh, but all must bow to the law, and ecclesiastical law equally with civil law is binding in its own domain." (*Ibid.*)

Significantly, in *Wheelock* the California Supreme Court was indifferent to the fate of the First Presbyterian Church of Los Angeles *qua corporation*. Inherent in following the church tribunal's decree the high court *distinguished* the corporation from the "church proper": "The spiritual or ecclesiastical body being dissolved, what becomes of the money held by the corporation? This question brings before us the consideration of the status of the corporation as relating to the church proper. The Civil Code of this state (original section 595) expressly permits religious bodies to incorporate, but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation the ecclesiastical body is still all important. *The corporation is a subordinate factor in the life and purposes of the church proper.* A religious corporation like the one at bar, under the laws of this state, is something peculiar to itself. *Its*

function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church." (*Wheelock, supra*, 119 Cal. at pp. 482-483, italics added.)

Later in the opinion the court returned to that distinction: "It is insisted that the First Presbyterian Church being incorporated the fact of incorporation stands as a lion in the path absolutely prohibiting any application of the doctrine of a *pro rata* division of the property. It is declared that the action of the Presbytery in dissolving the church . . . would result in an absolute dissolution of the corporation, and it is contended that a corporation under the laws of this state cannot be dissolved in that way. The trial court took this view of the case, and upon this ground sustained a general demurrer to the complaint. . . . But the solution of this contention does not appear to be material. A corporation composed simply of the trustees, or of all the members, is still a body separate and distinct from the church proper . . . ." (*Wheelock, supra*, 119 Cal. at pp. 485-486.)

The decision ended by rejecting the view of a Michigan court, expressed in *Wilson v. Livingstone* (1894) 99 Mich. 594, which had adhered to a simple majority-rule rationale independent of the principle of government in the Presbyterian Church: "The Michigan case especially declares that a majority of the members may control the property of the corporation, and practically that the title of the property of the corporation follows the majority wherever it may lead and however often and radical a change of faith overtakes it. In this state we take the other view." (*Wheelock, supra*, 119 Cal. at p. 487.)

Our Supreme Court had then only to note that the supporters of location B had a kind of consolation prize. Since they had not seceded from the Presbyterian Church, they were beneficiaries of the trust as much as the supporters of location A. (*Wheelock, supra*, 119 Cal. at p. 483.)

Further expounding on the problem of corporate ownership qua corporate ownership the court, in a series of quotes from other courts, included one from Indiana based on the locus of authority test: "It is declared by the supreme court of Indiana that 'the title to the property of a divided church is in that part of the organization which is acting in *harmony with its own law*.'" (*Wheelock, supra*, 119 Cal. at p. 485, italics added, quoting *White Lick, etc. v. White Lick, etc.* (1883) 89 Ind. 136.)

3. Horsman

The United States Supreme Court in *Watson* had clearly wanted civil courts to be able to resolve church property disputes without becoming mired in religious controversy and so deferred to the internal government of whatever church happened to be involved. *Horsman, supra*, 129 Cal. 131 is, in fact, a vindication of that approach, demonstrating how the principle of government approach allows secular courts to deftly avoid entangling themselves in theological matters.

In 1841 the Church of the United Brethren in Christ had organized itself into a general conference and adopted a constitution. Forty-eight years later, in 1889, at the general conference, the church adopted a new constitution. But it wasn't unani-

mous -- the vote was 110 to 20. The 110 became known as the "liberals" while the 20 were the "radicals." (*Horsman, supra*, 129 Cal. at p. 134.)

In Tulare County, however, most of the members (75 out of 80) sided with the radicals. The radicals sued to recover two tracts of land given the church about 10 years prior to the 1889 split, and then occupied by the liberals. (See *Horsman, supra,* 129 Cal. at pp. 134-135.)

Horsman began, like *Watson*, with the same three-category topology of religious property disputes: "The courts are in no way concerned with the transactions of ecclesiastical bodies except in so far as tangible rights of person or property are affected. Questions relating to these are divided by the court into three classes: The first is where property, by the express terms of the grant, 'is devoted to the teaching, support, or spread of some specific form of religious doctrine or belief'; the second, where it is held by or in trust for an independent congregation; and the third, where it is held by or in trust for a congregation or other association subordinate to some general church organization." (*Horsman, supra*, 129 Cal. at p. 136.)

However, in framing the issue before the court, the *Horsman* opinion used a phrase that we will venture to opine was, in retrospect, not the most felicitous: "true church." It said, "The sole question, therefore, is as to the identity of the church. If the radical is the true church, the plaintiffs are entitled to recover; otherwise not." (*Horsman, supra*, 129 Cal. at p. 135.) When *Horsman* was decided T.S. Eliot had not yet written his famous parody of the

"true church" in his poem "The Hippopotamus"[4] so the court was probably not as attuned to the dangers of wandering in the "miasmal mist" searching for the "true church" as later courts would be.

That said, it is clear from *Horsman* that our high court was not engaged in figuring out who was *theologically* correct in the dispute between the liberals and the radicals *within* the Church of the United Brethren in Christ. The liberals won, because the principle of government in the Church of the United Brethren in Christ was that the decisions of the General Conference were authoritative, and the General Conference had sided with the liberals.

The split in the Church of the United Brethren in Christ had generated litigation all over the country, including Michigan (see *Bear v. Heasley* (1893) 98 Mich. 279, where the Michigan Supreme Court had held in favor of the radicals on the theory that the general conference of 1889 failed to observe the requirements of the constitution adopted by the general conference in 1841. The California Supreme Court used the Michigan decision as a foil, taking the opportunity to articulate a principle of government view. The general conference was to be "'the highest legislative body . . . in the church'" and our high court analogized the general conference of the church, in its powers, to the British Parliament. (*Horsman, supra*, 129 Cal. at p. 140.) In the process, the *Horsman* court expressly adopted the principle of government views propounded by dissenting Judge

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[4] See Eliot, The Hippopotamus (1920) ["The hippo's feeble steps may err/ in compassing material ends/ while the True Church need never stir/ to gather in its dividends."].

Grant in the Michigan case. (See *Horsman, supra*, 129 Cal. at pp. 137-138.)[5]

4. Committee of Missions

Committee of Missions, supra, 157 Cal. 105 represents a fairly lengthy exploration by our Supreme Court into the mechanics of the church government of a group known as the as Pacific Synod of the Cumberland Presbyterian Church. The opinion relates that the Cumberland Presbyterians broke off from the Presbyterian Church in the United States of America because the Cumberland group disagreed with predestinarian aspects of the Westminster Confession. (*Id.* at pp. 110-112.)[6]

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[5] There was, to be sure, a tiny bit of lingering implied trust theory reflected in the court's long quotation with clear approval from Judge Grant's dissent: Only if the governing body's act "'destroyed'" the "'identity'" of the church so that it "'thereby became a new and different church'" could the act of the governing body not be dispositive. (See *Horsman, supra*, 129 Cal. at pp. 137-138.) Even so, the *Horsman* court noted, though, that such identity-destroying acts would only arise "in very extreme cases -- of which this is not one." (*Id.* at p. 138.) (And for what it is worth, or research has yet to uncover any California case employing a "destruction-of-identity" rationale in order to depart from what would be the result under a principle of government theory.) Since destruction-of-identity is an *exception* to *Horsman's* general approach of looking to the principle of government, it makes no difference for our purposes in this opinion whether that exception might be obviated by later United States Supreme Court cases that would caution against becoming involved in any religious controversy.

[6] To be sure, three times in the opinion the court used the word "fatalistic" to describe the doctrines of the U.S.A. group. (*Committee of Missions, supra*, 157 Cal. at pp. 112-113.) That makes no difference. As the recently popular saying went,

However, in 1900, the U.S.A. Presbyterians repudiated the "offensive doctrines contained in the Westminster confession" (*Committee of Missions, supra*, 157 Cal. at p. 113.), and that led to a movement to unify the Cumberland and U.S.A. churches. A unification did indeed take place in 1906, which was challenged by dissenters in the Cumberland group. Those dissenters decided that there were "vacancies" in the board of trustees of the *corporation* that owned the Cumberland church property (the official name was the "Permanent Committee of Missions of the Pacific Synod of the Cumberland Presbyterian Church in the United States"), and purported to elect their own slate. Then, in the name of the corporation, they sued the U.S.A church to deliver the Cumberland church's property over to them. They lost at trial and the Supreme Court affirmed in a detailed exposition of the internal church government of the Cumberland church -- the point of which was that the unification had been duly approved by the *highest governing authority* of the Cumberland church, quoting *Watson's* "highest of the church judicatories to which the matter has been carried" language. (*Committee of Missions, supra*, 157 Cal. at pp. 128-129, quoting *Watson, supra*, 80 U.S. at p. 727.)

Indeed, in parallel with *Watson*, the California Supreme Court emphasized that the rule of looking to the highest church authority "although not accepted in England" was "the prevailing rule in this country." (*Committee of Missions, supra*, 157 Cal. at

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whatever. Like the case before us, the *Committee of Missions* case would not turn on such local color.

p. 128.) Thus it made no difference that the unification hadn't been put to a vote of the membership (*id.* at p. 122-123), or that the litigation involved donations made to the Cumberland church as such (*id.* at p. 126-127).

5. Rosicrucian Fellowship

Rosicrucian Fellowship, supra, 39 Cal.2d 121, is not a case readily susceptible to a reader-friendly retelling of its basic facts. Suffice to say, though, that one point comes through loud and clear: In the tradition of *Wheelock*, the high court did not operate under a rule that corporate ownership was the end of all inquiries as to rights to church property (in that case, the property was called "Mt. Ecclesia").

The case involved a religious organization that didn't have *any* organized form of church government -- not hierarchical, not congregational, not *any*. (See *Rosicrucian Fellowship, supra,* 39 Cal.2d at p. 128 ["The judgment . . . declared . . . that the church has no ecclesiastical organization or system of church government . . . ."] and p. 133 [noting plaintiffs' argument that the Rosicrucians were an "anomalous class" because it fit none of the three forms of church government (hierarchical, assembly or congregational)].)

Indeed, one of the arguments in the *Rosicrucian Fellowship* case was that in a religion that has no church government, by necessity the fact that a religious corporation owns title to property trumps any rights in mere followers of the church. The high court clearly rejected that point: (See *Rosicrucian Fellowship, supra,* 39 Cal.2d at p. 134 ["It appears that from the first, the unorganized church and its

members through its leaders, the Heindels, have exercised property and civil rights incident to ecclesiastical functions which were not surrendered to plaintiff corporation."].) Rather, our Supreme Court affirmed a judgment declaring that the corporation was a trustee for an "unincorporated church [which] was the basic group and owned most of the rights" to the property. (*Id.* at p. 135.)

6. Providence Baptist

The problem of governance in the context of a congregationally organized church was confronted by our high court in *Providence Baptist, supra,* 40 Cal.2d 55. A Baptist pastor had incorporated a Baptist church in 1945, with a board of three trustees (himself and two others). One day in 1950, the two other trustees adopted a resolution removing him and the next day at a meeting of members of the congregation adopted the same resolution. The incorporated church and its trustees sued the pastor to get back certain funds and records. The trial court issued a decision that the trustees were entitled to those funds and records. However, it also concluded that neither the trustees nor the pastor could hold a fair election about removing him from office, and so appointed a referee to conduct an election among all the members after due notice. The pastor petitioned for writ relief on the theory that the court was intruding into ecclesiastical matters; his writ was denied in a published opinion.

The *Providence Baptist* court specifically noted that the church "is the congregational type in which its affairs are controlled by the members." (*Providence Baptist, supra,* 40 Cal.2d at p. 61.) Hence there was "no tribunal but the congregation" to

which the court might look, and, in that context, a civil court could indeed determine "whether the meeting at which a pastor was removed was properly conducted according to the usage, contracts and rules of the society" insofar as the civil and property rights involved with the pastor's office were involved. (*Id.* at pp. 61-62.)

As in all the previous cases (save maybe *Rosicrucian Fellowship*, the point of which was that corporate form was not dispositive), the California Supreme Court centered its decision on the proper locus of ecclesiastical authority -- in its phrase "the appropriate body of the church." It was *that body* that would make the decision. (*Providence Baptist, supra*, 40 Cal.2d at p. 63 ["While we may not be dealing with the officer of a corporation in the strict sense (the pastor of a church is involved) the situation is similar and we see no reason why an election cannot be conducted where, as appears, a fair and proper election cannot be conducted by the church and the election previously held was irregular and of no effect. In other words the appropriate body of the church is assisted in acting within its proper sphere, according to its rules and regulations, to protect civil and property rights."].) Such an activity was, of course, different from determining whether the pastor was "preaching a theology contrary to the denominational doctrine." (*Ibid.*)

D. The United States Supreme Court Cases in the Decade Prior to Church of Palm Springs

As we shall see when we come to *Church of Palm Springs, supra*, 89 Cal.App.3d 910, that court read

four United States Supreme Court cases of the previous decade as *requiring* that states use a four-factor approach that would come to be called "neutral principles analysis." We now turn to the question of whether any of those cases really did so.

1. Hull Church

Hull Church arose out of a secession of local Presbyterian Churches from the general Presbyterian Church, specifically involving two congregations in Georgia.

Readers will recall that *Watson* was decided as a diversity case, so it did not announce a nationwide rule. Thus, it was possible, even by the late 1960's, for a state like Georgia to still be using Lord Eldon's implied trust theory in which a major component was whether a religious organization had "departed from the tenets of faith and practice it held at the time the local churches affiliated with it." (*Hull Church, supra*, 393 U.S. at p. 441.) And in the opinion United States Supreme Court expressly linked Georgia's approach with the English implied-trust-departure-from-doctrine theory. (See *id.* p. 443, fn. 2 [saying that the Georgia theory "derives from principles fashioned by English courts" and citing the English opinions articulating those principles].)

Right from the beginning, the *Hull Church* court formulated the issue in terms of whether Georgia's implied-trust-departure-from-doctrine theory offended the First Amendment: "Under Georgia law the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held

at the time the local churches affiliated with it. The question presented is whether the restraints of the First Amendment, as applied to the States through the Fourteenth Amendment, permit a civil court to award church property on the basis of the interpretation and significance the civil court assigns to aspects of church doctrine." (*Hull Church, supra*, 393 U.S. at p. 441.) In two sentences the federal high court had pinpointed the entanglement inherent in the implied trust doctrine. So, of course, the answer was no -- the First Amendment did *not* permit the entanglement with religious controversy inherent in Georgia's "departure-from-doctrine" approach.

The court devoted the next three paragraphs to quickly describing the litigation, the third of which returned to the theme that Georgia law required civil courts to determine departures from church doctrine. (See *Hull Church, supra*, 393 U.S. at pp. 443-444 ["the jury was instructed to determine whether the actions of the general church 'amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church), so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded"'].)

Having set up the issue for resolution, the court next turned to prior U.S. Supreme Court case law. The body of the opinion was then taken up with discussions of a prior quartet of federal high court cases, all of which had adhered to *Watson's* principle of government approach: *Watson* itself, then *Gonzalez v. Roman Catholic Archbishop of Manila* (1929) 280 U.S. 1 (*Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North Amer-*

ica (1952) 344 U.S. 94 (*Kedroff*); and finally *Kreshik v. St. Nicholas Cathedral* (1960) 363 U.S. 190 (*Kreshik*).

As the descriptions of all four cases by the *Hull Church* opinion indicated, the court *agreed* with the approach of those cases:

-- It pointed out that language from *Watson* left "the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes." (*Hull Church, supra*, 393 U.S. at p. 447, original italics.)

-- It quoted with apparent approval Justice Brandeis's point in *Gonzalez* that "'In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.'" (*Hull Church, supra*, 393 U.S. at p. 447.)

-- It also noted that the decision of the church in Moscow in a "Moscow-based" church was binding on North American churches in *Kedroff*. (*Hull Church, supra*, 393 U.S. at pp. 447-448.

-- And it further noted that in *Kreshik* the federal supreme court had held that a legislature could not transfer control of a cathedral to churches away from the "central governing authority of the Russian Orthodox Church." (*Hull Church, supra*, 393 U.S. at pp. 448-449.)

Having finished its canvass of prior authority, the *Hull Church* court then wrote a passage that would later become the main prooftext in the *Church of Palm Springs* opinion justifying a change to "neutral

principles." Here is that passage: "The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated." (*Hull Church, supra*, 393 U.S. at pp. 449-450.)

When read in context, however, the point of that paragraph was consistent with its main point of the *Hull Church* opinion: Use of the implied trust doctrine with its departure-from-doctrine element jeopardized "First Amendment values" by making property "turn on the resolution by civil courts of controversies over religious doctrine and practice." (*Hull Church, supra*, 393 U.S. at p. 449.) That paragraph was clearly *not* intended to suggest that the principle of government approach offended First Amendment values, as shown by what had come just before -- an approving discussion of four decisions all of which had *used* the principle of government approach.

The rest of the paragraph and the next one were elaborations on the theme that the Georgia implied trust doctrine required civil courts to decide religious controversies, but -- and this is significant -- the *Hull Church* court went out of its way to *distinguish* the *Gonzalez* decision from the *Hull Church's* condemnation of civil courts adjudicating religious doctrine. *Gonzalez* was a case where a will directed that a family member be appointed to a chaplaincy in the Roman Catholic Church, as if the governing authori-

ties of that church had nothing to say in the matter. The trial court entered an order requiring the appointment. The United States Supreme Court affirmed a judgment of the Supreme Court of the Philippines *reversing* the trial court's upending of the proper ecclesiastical chain of command. (See *Hull Church, supra*, 393 U.S. at p. 447.) The *Hull Church* court acknowledged that *Gonzalez* involved a "marginal civil court review of ecclesiastical determinations" (*Hull Church, supra*, 393 U.S. at p. 447), an acknowledgement that is understandable given that Justice Brandeis left the door open in *Gonzalez* for civil court determinations of whether ecclesiastical determinations involved "fraud, collusion or arbitrariness." The court said, though, that the *Gonzalez* opinion had not erred even under the *Hull Church* court repudiation of the Georgia implied trust doctrine, in language that once again emphasized *Watson's* principle of government approach:

"Since the Georgia courts on remand may undertake to determine whether petitioner [the general church] is entitled to relief on its cross-claims, we find it appropriate to remark that the departure-from-doctrine element of Georgia's implied trust theory can play no role in any future judicial proceedings. The departure-from-doctrine approach is *not susceptible of the marginal judicial involvement contemplated in Gonzalez.* Gonzalez' rights under a will turned on a church decision, the Archbishop's, as to church law, the qualifications for the chaplaincy. *It was the archbishopric, not the civil courts, which had the task of analyzing and interpreting church law in order to determine the validity of Gonzalez' claim* to a chaplaincy. Thus, the civil courts could adjudicate

the rights under the will without interpreting or weighing church doctrine but simply *by engaging in the narrowest kind of review of a specific church decision -- i.e., whether that decision resulted from fraud, collusion or arbitrariness.* Such review does *not* inject the civil courts into substantive ecclesiastical matters." (*Hull Church, supra*, 393 U.S. at pp. 450-451, all italics added.) And with that distinguishment of *Gonzalez*, the *Hull Church* court reversed the judgment of the Georgia Supreme Court.

However, Justice Harlan, in concurrence, wanted to make a point about *express* trusts, that had not been issue in *Hull Church*: While he agreed with the majority that Georgia's departure-from-doctrine doctrine meant unconstitutional entanglement with religion because it forced "civilian courts to weigh the significance and the meaning of disputed religious doctrine," he saw nothing wrong with civilian courts enforcing express trusts. The example he gave was one where a donor "expressly gives his church some money on the condition that the church never ordain a woman as a minister or elder" or "never amend certain specified articles of the Confession of Faith" then "the church should not be permitted to keep the property simply because church authorities" have approved the "doctrinal innovation." (*Hull Church, supra*, 393 U.S. at p. 452 (conc. opn. of Harlan, J.). We will meet the spirit of Justice Harlan's concurrence again when we discuss section 9142. But for the moment we now turn to the second of the four U.S. Supreme Court cases preceding *Church of Palm Springs*.

2. Eldership

The *Eldership* case had reached the U.S. Supreme Court's docket prior to the *Hull Church* case, and had been remanded for consideration in light of *Hull Church*. (*Eldership, supra*, 396 U.S. at p. 367, fn. 2.) It was, literally, a one-paragraph per curiam opinion dismissing an appeal "for want of a substantial federal question" because, on remand, the state court had gotten it right and not offended First Amendment principles by using a departure-from-doctrine approach. (*Id.* at p. 367.)

Specifically, on remand, the Maryland intermediate appellate court had "relied upon" four general sources, described only in the most general terms by the *Eldership* court: (1) state statutes; (2) language in deeds conveying the properties; (3) terms of charters of the corporations; and (4) provisions in the church's constitution pertinent to the ownership and control of church property. (*Eldership, supra*, 396 U.S. at p. 367.) Since the matter had been resolved in the state courts without "inquiry into religious doctrine," there was a "want of a substantial federal question" and the appellants' appeal was dismissed. And that was *all* the Eldership opinion said. (*Eldership, supra*, 396 U.S. at p. 368.)

However, there was a three-justice concurring opinion written by Justice Brennan who had authored the opinion for the court in *Hull Church*. Justice Brennan's concurring opinion was obviously intended to provide helpful guidance to state legislatures and courts. (See generally *Eldership, supra*, 396 U.S. at p. 368 (conc. opn. of Brennan, J.).)

Structurally, the concurring opinion was straightforward: There were three *permissible* ways for states to adjudicate church property disputes, even

though in *Hull Church* the high court had said that departure-from-doctrine was not permissible:

(1) *The principle of government*: "Thus the States may adopt the approach of *Watson v. Jones* . . . and enforce the property decisions made . . . within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue . . . ." (*Eldership, supra*, 396 U.S. at pp. 368-369 (conc. opn. of Brennan, J.)

(2) *Neutral principles*: "'[N]eutral principles of law, developed for use in all property disputes,' [citation] provide *another* means for resolving litigation over religious property." (*Eldership, supra*. 396 U.S. at p. 370 (conc. opn. of Brennan, J), italics added.)

(3) *Special Statutes*: "A third possible approach is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine." (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.)

But, with perfect parallel structure, for every permissible method, the three-justice concurring opinion in *Eldership* had a caveat:

(1) For the principle of government, the three justices cautioned that if the question of the identity of the governing body is *itself* a matter of "substantial controversy," then "civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy." (*Eldership, supra*, 396 U.S. at pp. 369-370 (conc. opn. of Brennan, J.).) We note that the question of identity *qua* identity of the governing body was not being made off-limits, only reference to "religious law and usage" to make the determination.

(2) For the neutral-principles-formal title approach, the warning was that "general principles of property law may not be relied upon if their application requires civil courts to decide doctrinal issues." (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.).)

(3) Finally, the statutory approach had to be "carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies," (*Eldership, supra*, 396 U.S. at p. 370 (conc. opn. of Brennan, J.)), a formulation that obviously contemplated some deference to "ecclesiastical polity."

Also, in addressing *Watson's* principle of government approach, it is worth noting that the three-justice concurring opinion in *Eldership* added a footnote to address the issue of *express* trusts that had been the subject of Justice Harlan's separate concurrence in *Hull Church*: *Express trusts* could not be "enforced if enforcement is constitutionally impermissible under [*Hull Church*]." And then the three justices added: "Any language in *Watson, supra*, at 722-723, that may be read to the contrary must be disapproved. Only express conditions that may be effected without consideration of doctrine are civilly enforceable." (*Eldership, supra*, 396 U.S. at p.369, fn. 2 (conc. opn. of Brennan, J.) (That last bit by a minority of three justices purporting to disapprove a previous majority opinion was unusual for a concurring opinion. The last we checked, three justices on a nine-justice court cannot, in a separate concurring opinion, disapprove of language in a previous majority opinion, but since the issue doesn't arise in the case before us -- even the three justices in the *Eldership* concurrence recognized the legitimacy of the

principle of government approach -- we need not go any further into the matter.)

Watson's approach (and by extension, California's *Baker-Wheelock* line), had easily survived *Eldership*. That approach would actually be specifically reapproved in the next case.

3. Serbian Orthodox

If the three judges who had concurred in *Eldership* had any thought of rejecting Watson's principle of government approach, it was clearly dispelled in the *Serbian Orthodox* case, where Justice Brennan, this time writing for the majority, wrote a ringing affirmation of the *Watson* highest judicatory tribunal rule, quoting large swaths of the *Watson* opinion with gusto, including its "'right to establish tribunals . . . among themselves'" language that we have already quoted above. (See *Serbian Orthodox, supra*, 426 U.S. at pp. 710-711.)

To the degree that *Serbian Orthodox* represented any departure at all from previous United States Supreme Court case law, it was in the direction of squeezing out that little bit of wriggle room that Justice Brandeis had left when he wrote an introductory clause in *Gonzalez* using the words "In the absence of fraud, collusion, or arbitrariness . . . ." (*Serbian Orthodox, supra*, 426 U.S. at p. 711.)

That is, *Serbian Orthodox* was all about whether there was an arbitrariness exception to the principle of government approach. If there had been one before based on language in *Gonzalez*, there weren't any more after the *Serbian Orthodox* court got through with it. The highest tribunal in the Serbian Orthodox Church -- and there was no question on the

point -- had demoted, then defrocked, a particular bishop. The Illinois state Supreme Court, however, had determined that the bishop's removal had been "'arbitrary'" (see *Serbian Orthodox, supra*, 426 U.S. at pp. 708, 718) because (quoting *Serbian Orthodox* quoting the Illinois Supreme Court) "'a detailed review of the evidence discloses that the proceedings resulting in [the bishop's] removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of Serbian Orthodox Church.'" (*Serbian Orthodox, supra*, 426 U.S. at p. 718.)

That review conducted by a state was beyond the pale -- the Supreme Court was quite clear that the civil courts were not to play amateur canon lawyers and second-guess the decisions of a church's highest tribunal. In effect, the Illinois Supreme Court had impermissibly engaged in a "judicial rewriting of church law." (*Serbian Orthodox, supra*, 426 U.S. at p. 719; see also *id.* at pp. 712-713 ["The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures in arriving at those decisions."].)

We need only note further that the *Serbian Orthodox* opinion, besides invoking -- not rejecting -- the *Watson* principle of government or highest tribunal approach, contains a number of passages which unmistakably approve of looking to a church's organizational hierarchy as a principle for settling church property disputes, and in fact indicate that for states to *ignore* hierarchy creates First Amendment prob-

lems of its own: "For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a *church of hierarchical polity, but must accept such decisions as binding on them*, in their application to the religious issues of doctrine or polity before them." (*Serbian Orthodox, supra*, 426 U.S. at p. 709, italics added.)

And further, "In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, *the Constitution requires that civil courts accept their decisions as binding upon them*." (*Serbian Orthodox, supra*, 426 U.S. at pp. 724-725, italics added.)

The two separate opinions from *Serbian Orthodox* should also be noted, since those opinions foretold future nuances to be developed in the last of the four cases, *Jones*. Chief Justice Burger (joined by Justice White) wrote a one-paragraph concurrence to make the point that *whether* a church was hierarchically organized was still a matter for the civil courts' "ultimate decision." (*Serbian Orthodox, supra*, 426 U.S. at p. 725 (conc. opn. of C.J. Burger).)

And Justice Rehnquist (joined by Justice Stevens) dissented in the name of state's rights defending the Illinois state court approach. He also mixed in a little skepticism about the *Watson* rule, or at least the

exception for arbitrariness that Justice Brandeis had inserted into it in *Gonzalez*, in this rhetorical flourish: "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." (*Serbian Orthodox, supra*, 426 U.S. at p. 727 (dis. opn. of Rehnquist, J.).)

4. Jones

The final movement in the quartet played before the *Church of Palm Springs* case came by way of *Jones v. Wolf* (1979) 443 U.S. 595, which might be styled the sequel to *Hull Church*. As we have seen, less than 10 years before Georgia had been using Lord Elton's implied trust theory, that theory had failed constitutional scrutiny in *Hull Church*, and the state had been forced to develop an alternative approach. The approach chosen by the Georgia courts was described by *Jones* as a "neutral-principles analysis." (*Jones, supra*, 443 U.S. at p. 601.) (The evolution of Georgia law after *Hull Church* was traced in *Jones v. Wolf, supra*, 443 U.S. at pp. 599-601.)

Under the neutral principles analysis used by the Georgia courts, the numerical majority of a particular Presbyterian congregation had voted to secede from the general church (the split was 164 to go, 94 to stay), and the *Georgia* courts, finding no basis for an implied trust in state statutes, the corporate charter of the local church, or even in the Presbyterian Book of Church Order, held that "legal title to the property of the [local] Vineville church was vested in the local congregation," and further held "[w]ithout further analysis or elaboration," the local

congregation was represented by the majority faction. (*Jones, supra*, 443 U.S. at p. 601.)

The central problem before the federal high court in *Jones* was whether Georgia's relatively recent conversion to neutral principles analysis was *permissible* under the First Amendment. One must remember: Up to *Jones*, a majority of the United States Supreme Court had never clearly okayed neutral principles analysis. The closest it had come was that one-paragraph dismissal of an appeal from the Maryland state courts in *Eldership*.

Interestingly though (interesting in that it helps explain the nature of the issue that the court was tackling in *Jones*) the four dissenters did *not* include either Justice Rehnquist or Justice Stevens, who had favored a states' rights position in their dissent in *Serbian Orthodox*. This time they stood in the five-justice majority, which is precisely what one would expect given the states' right issue that was before the *Jones* court.

The split in the court was over whether the *Watson* highest tribunal approach was, in fact, *mandated* on the state law as a matter of First Amendment law (the dissenters' position) or whether a state had the *option*, consistent with the First Amendment, of adopting the neutral principles approach. (See *Jones, supra*, 443 U.S. at p. 605 (maj. opn.) ["We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."].)

Yes, said the majority. And they perceived that the neutral principles approach has some things go-

ing for it: "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." (*Jones, supra*, 443 U.S. at p. 603.) That meant states were "constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." (*Id.* at p. 604.)

The *Jones* majority also appears to have been aware of an obvious problem with the fact of a *transition* from a highest tribunal approach to neutral principles analysis: Neutral principles analysis makes a church property dispute issue turn on the quality of legal drafting done years *prior* to the dispute, and drafting done in a different legal environment.

And so the majority added this -- well, it's not quite dicta because the point is to bolster the *permissibility* of using neutral principles analysis, but, strictly speaking, it does involve speculation involving permutations of the approach the court was approving -- language to round out its opinion: "Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the

general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.*" (*Jones, supra*, 443 U.S. at p. 606, italics added.)

Still, the case wasn't over -- the majority was not willing to merely affirm the result in the Georgia courts. That is, Georgia neutral principles might declare the property to be controlled by the local congregation, but that still left the question of exactly who was the "true representative" of that congregation? (See *Jones, supra*, 443 U.S. at p. 607 ["Petitioners earnestly submit that the question of which faction is the true representative of the Vineville church is an ecclesiastical question that cannot be answered by a civil court."].)

The Georgia courts, however, hadn't dealt with *that* problem. So the *Jones* majority assured them that a presumption of majority rule would be permissible under the First Amendment (*Jones, supra*, 443 U.S. at pp. 607-608), but also noted that there were strains in Georgia law that might allow courts to ascertain the true representatives of the local congregation based upon a *civil court's* analysis of the Presbyterian Church's Book of Church Order, and *that* analysis was definitely impermissible given that the hierarchical Presbyterian Church had *already* made that decision in favor of the minority. (See *Jones, supra*, 443 U.S. at p. 609 ["All this may suggest that the identity of the 'Vineville Presbyterian Church' named in the deeds must be determined according to terms of the Book of Church Order, which sets out the laws and regulations of churches affiliated with PCUS. Such a determination, however, would appear to require a civil court to pass on ques-

tions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which already has determined that petitioners represent the 'true congregation' of the Vineville church."].)

That worry dovetailed with an earlier concern expressed in the majority opinion (in the context of talking about the *advantages* of neutral principles analysis) that even neutral principles analysis might require civil courts to resolve religious controversies. If that happened, *then the principle of government rule was required as a matter of constitutional law*: "The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. *If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.*" (*Jones, supra*, 443 U.S. at p. 604, italics added.)

E. The California Intermediate Appellate Court Cases Breaking With the State Supreme Court Cases

As it turns out, *Church of Palm Springs* and, ultimately, *Barker*, were preceded by two other decisions of the intermediate appellate court which paved the way for the break. We include those two decisions, *In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850 (*Metropolitan Baptist*) and *Wilson v. Hinkle* (1977) 67 Cal.App.3d 506 (*Wilson*) because, after those four cases, California's common law regarding church property disputes appeared dramatically different from what it had been since our state's highest court had decided *Providence Baptist*.

1. Metropolitan Baptist

The very first California case to use the phrase "neutral principles" in any sort of church context was *Metropolitan Baptist, supra,* 48 Cal.App.3d 850. That fact turns out to be extremely ironic, because *Metropolitan Baptist* is probably the closest California case we have, or will review in this opinion, to employing a version of Lord Eldon's implied trust approach. And in fact the court actually inquired into the nature of the teachings of particular churches to make its decision. To be specific, the *Metropolitan Baptist* court actually ended up ascertaining whether two Northern California Baptist churches were "fundamental" Baptist churches -- as distinct from, presumably, *non*-fundamental Baptist churches. (See *id.* at p. 856.)

There was a Baptist Church in Richmond, California whose membership, by 1970, shrank to six members, and three of those were the pastor, his wife, and his adult son. So all six members voted to dissolve the church corporation, and liquidate and distribute the corporation's assets, consisting of

about $25,000. The six members wanted to split the assets one-third to a Dublin Baptist church, one-third to an Iowan Baptist Church, one-sixth to a Serviceman's Center in Long Beach, one-twelfth to an Oakland Baptist church, and one-twelfth to a Baptist seminary. (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 853-854.)

The Attorney General, however, became involved in the case (indeed, he was the respondent on appeal) and advocated a distribution more in keeping with the original intent of the incorporators (one of whom intervened in the case). The original articles of incorporation stated that the purpose was to form a Baptist church in Richmond, and extrinsic evidence was allowed in by the trial court that the founders also wanted that church to be "in essential accord with the beliefs of fundamental Baptist churches." (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 855.) Several of the proposed distributees obviously did not qualify, such as the seminary and the Serviceman's Center.

The trial court used an approach of trying to approximate the intent of the incorporators: The assets were intended to go to "fundamental" Baptist churches in Richmond, and, since there were no such "fundamental" Baptist churches in Richmond, the next best thing was to split them between the two geographically closest "fundamental" Baptist churches, the one in Oakland and the one in Dublin. (See *Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 855-856.) The six-member Richmond Baptist church appealed.

In affirming, the *Metropolitan Baptist* court devoted almost no attention to the problem that it had

chosen the recipients of the assets based on a religious test -- whether they were "fundamental" or not, and certainly did not discuss the implications of a court being forced to make such a selection. The whole issue was taken care of in two paragraphs with no citation to any authority: "Our first inquiry is whether the superior court's determination, that the Church's purpose was to teach and preach the Scriptures, as a church in Richmond, Contra Costa County, in essential accord with the beliefs of fundamental Baptist churches, was supported by substantial evidence." (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 856.)

That was one paragraph, setting up the issue. It was followed by a second paragraph merely saying that substantial evidence supported the trial court's conclusion, and which did not give any details. (It probably would have been productive if it had -- the very act of writing up why the Oakland and Dublin churches qualified as "fundamental" Baptist churches might have alerted the *Metropolitan Baptist* court that it was wandering in the miasmal mist searching for a "true" "fundamental" Baptist church.)

Next, however, came the main issue, which was in response to the assertion, raised by the remnant of the appellant Richmond church, that the court should follow the decision of the congregation, i.e., use the principle of government rule that *Watson* and the *Baker-Wheelock* line of California Supreme Court had used., though the *Metropolitan Baptist* did not give any indication that the principle of government rule was the product of Supreme Court deci-

sions. (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 856.)

That point was refuted by the *Metropolitan Baptist* court in an analysis that went this way: Because the Richmond church was organized as a nonprofit religious corporation, it therefore "follow[ed]" that it held its property in trust "'to carry out the objects for which the organization was created.'" (*Metropolitan Baptist, supra*, 48 Cal.App.3d at p. 857, quoting *Lynch v. Spilman* (1967) 67 Cal.2d 251, 260. (*Lynch* was a case involving a trust to establish a boys' or youth club.) Hence, the distribution was proper under the *cy pres* doctrine as carrying out "original trust purposes . . . as nearly as possible." (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 857-858.)

It was in that context -- that is, of justifying the application of *cy pres* to the liquidation of a congregationally organized church -- that the *Metropolitan Baptist* court made statements that resolution of church property disputes "may sometimes touch upon ecclesiastical concepts," but then juxtaposed the comment against the development of neutral principles. ("To resolve the often delicate question of the First Amendment's application to disputes concerning church property, a principle of state 'neutrality' has developed. This concept has been described as the application of 'neutral principles of law, developed for use in all property disputes, which can be applied' without establishing 'religion . . . .'" (*Metropolitan Baptist, supra*, 48 Cal.App.3d at pp. 858-859, quoting *Hull Church, supra*, 393 U.S. at p. 449.)

The court did not address how the *cy pres* doctrine -- to be sure, a traditional and neutral principle of trust law in non-religion cases -- -- interacted with

the need of courts to stay away from religious disputes, or differed from Lord Eldon's discredited implied trust doctrine when applied to church property disputes. Nor did the court mention, much less address, the line of California Supreme Court cases that adhered to a governmental principle approach. That lacuna is particularly conspicuous given that the Richmond Church had invoked it in order to justify their (not its, their -- it was a congregationally organized church, remember) proposed distribution. (See *Metropolitan Church, supra*, 48 Cal.App.3d at p. 856 [noting contention that the congregation's proposed distribution was an "'ecclesiastical decision binding and conclusive upon the court'" albeit "'under the doctrine of separation of church and state'" as distinct from prior California precedent].)

2. Wilson

The next case on the road to *Barker* was *Wilson, supra*, 67 Cal.App.3d 506. Strictly speaking, *Wilson* was not a property dispute case, except to the degree that a *purely* religious argument about whether a minister who *otherwise* would have control over church facilities implicated a property dispute. It was framed and written as a *jurisdiction* case.

In *Wilson*, there was a "former minister" of what appears from the facts as stated by the court to be local congregation (with church property) that was part of the "Unity Movement" and a "present minister" of the same congregation. The former minister and his followers sued the present minister for quiet title and return of the church property on the ground that the present minister had strayed from the (unnamed in the opinion) tenets of the Unity Movement. (See *Wilson, supra*, 67 Cal.App.3d at pp. 508-509.)

Judging from the opinion, the doctrinal straying was the *only* ground for the suit. There is no assertion by the former minister that, for example, the Unity Movement was a hierarchical religious organization and that its highest church adjudicatory had removed the present minister from his post.

Thus, anyone at all familiar with the repudiation by the federal high court in *Watson* of Lord Eldon's implied trust theory would know the case was doomed. It was thus no surprise that the *Wilson* court affirmed a judgment after demurrer to the complaint based on lack of jurisdiction. (See *Wilson, supra*, 67 Cal.App.3d at pp. 509-512.) *Wilson* involved precisely the kind of religious controversy framed in the guise of a church property dispute that *Watson* had tried to avoid.

However, the *Wilson* court also swept (or, to be precise, tried to sweep) from the field several cases from the *Baker-Wheelock* line on the theory that *Hull Church* had implicitly overruled it. First it opened a paragraph with this broad declaration: "The California cases cited by appellants are either inapposite or have been implicitly overruled by *Hull, supra*, and *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 [no pinpoint page cite, parallel citations omitted]." (*Wilson, supra*, 67 Cal.App.3d at p. 511.) Alas, the *Wilson* court did not specify *which* "California cases" it was talking about, or why it thought they had been overruled.

Next followed a paragraph explaining that that a civil court could "accept jurisdiction" where ecclesiastical questions were only incidentally involved, thus distinguishing the recently decided cases of *St. James Armenian Church of Los Angeles v. Kurkjian*

(1975) 47 Cal.App.3d 547[7] and *Metropolitan Baptist,* which we have just discussed. The paragraph, however, ended with these words: "However, we do note that the California Supreme Court cases cited in *In re Metropolitan Baptist Church of Richmond, Inc., supra,* especially *Rosicrucian Fellow., supra,* 39 Cal.2d at p. 131 -- or at least some of the language therein -- is governed and changed by *Hull.* (See also *Providence Baptist Church v. Superior Ct., supra,* 40 Cal.2d at p. 63.)"

The *Wilson* court did not elaborate, and it is not clear which precise "California Supreme Court cases" cited in *Metropolitan Baptist* the *Wilson* court was referring to. The *Metropolitan Baptist* court had cited *Rosicrucian Fellowship, supra,* 39 Cal.2d at pp. 131-132, and *Horsman, supra,* 129 Cal. at page 138, for the proposition that matters involving "creeds" "considerations of faith" and even "general polity" were "[e]cclesiastical matters" and then immediately cited *Hull Church* and the same page 131 of *Rosicrucian Fellowship* (plus two appellate opinions) for the proposition that "In such matters the state, and its courts, have no legitimate concern or jurisdiction." (*Metropolitan Baptist, supra,* 48 Cal.App.3d at p. 858.)

The only other California Supreme Court decision mentioned in *Metropolitan Baptist* (besides two non-

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[7] Actually, as the *Wilson* court said, *St. James Armenian* involved "no dispute whatsoever" about "ecclesiastical doctrine." (*Wilson, supra,* 67 Cal.App.3d at p. 511.) There, a church sued the chairman of its parish council and a friend of his who was a real estate agent for not disclosing the agent's taking commissions on the sale of old church property and the purchase of new church property.

religious charitable trust cases mentioned on page 860 of the opinion) was *Providence Baptist*, cited for the proposition -- apparently one with which the *Wilson* court *agreed* -- that courts may accept jurisdiction over property disputes when any "ecclesiastical questions" are only "indirectly involved." (*Wilson*, *supra*, 48 Cal.App.3d at p. 859.)

3. Church of Palm Springs

A little bit of ground work having been laid, *Church of Palm Springs, supra*

89 Cal.App.3d 910 (also sometimes referred to as "*Presbytery of Riverside*") struck off in a clearly different direction than the one used by the state Supreme Court in the *Baker-Wheelock* line of cases.

Preliminarily, we should note that it is an interesting legal question of whether *Church of Palm Springs* might have reached the result it did -- affirming a trial court decision to let a local church have control over the property as against the claims of a hierarchical denomination -- by following the rule of stare decisis and applying the principle of government rule from *Watson* and the *Baker-Wheelock* line. Years later, another panel of the intermediate appellate court, in *Guardian Angel*, would elegantly (elegant at least in the mathematical sense, and perhaps the stylist sense, but readers can judge that for themselves), distinguish *Church of Palm Springs* by noting that the local church in that case had had an independent existence *prior* to affiliating with a larger denomination, thus one might be able to say the substantive authority in the local church always was the local congregation: "In that case [*Palm Springs*], the local church had been

known for a number of years as the Community Church of Palm Springs, having no hierarchical affiliation. The church later affiliated with the Presbyterian Church, although it quickly discontinued the use of 'Presbyterian' in its name, reverting to 'Community Church of Palm Springs.' Moreover, throughout its history, the church had extended membership to all Protestant denominations. The church described itself as interdenominational and nondenominational." (*Guardian Angel, supra*, 118 Cal.App.4th at p. 929, citing *Palm Springs, supra*, 89 Cal.App.3d at pp. 916-917.)

In other words, as *Guardian Angel* would see *Church of Palm Springs*, the congregation was the original source of governing authority, and it never relinquished that authority upon affiliating with the larger denomination.

While the case might be so distinguished, the fact remains that the *Church of Palm Springs* opinion proceeded on the premise that the "neutral-principles" approach that had been approved for use in state courts in *Jones* was now mandatory and not just optional.

Church of Palm Springs involved a local community church that had been affiliated with the United Presbyterian Church in the United States of America (a national church). The national church was hierarchical, in "ascending representational levels of ecclesiastical authority" (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 915.) In 1967, disputes arose over unspecified "several doctrinal changes" and "a mandate for social action" adopted by the national church's general assembly; the disputes could not be resolved, and the members of the community

church "voted to withdraw from the general church." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 917-918.)

Interestingly, the local church did not directly secede from the general denomination: In a manner reminiscent of the doctrine of exhaustion of administrative remedies, it presented a petition to 181st General Assembly of the general church to "withdraw with its property." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 918.) However, the administrative route was never completed, in the court's phrase, "its request was never considered or decided on the merits" because the matter was referred to a committee that determined the petition had been "'filed by an independent body which has renounced the jurisdiction of the United Presbyterian Church'" and therefore, "'cannot be considered.'" (*Id.* at p. 919.) In subsequent litigation the trial court determined that the local church was the owner of the property.

It was the ambiguity of the internal proceedings that was the very first reason given by the *Church of Palm Springs* court for rejecting a disposition of the property in favor of the national church: "In the first place, there is a serious question whether the issue of ownership of the disputed property was ever finally determined on its merits by the judicatories of UPCUSA." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 919.)

The court's second reason occupied most of the long opinion. The court began by acknowledging the truth of the proposition that decisions of the highest church judicatories must be accepted by civil courts as "'final, and as binding on them.'" (*Palm Springs,*

supra, 89 Cal.App.3d at p. 919, quoting *Watson*, *supra*, 80 U.S. 679, 727.) But, said the *Church of Palm Springs* court, that rule was expressly *qualified* (not repealed) by the more recently announced rule that civil courts must adjudicate the property dispute "without attempting to resolve the underlying ecclesiastical controversy." (*Church of Palm Springs*, *supra*, 89 Cal.App.3d at p. 920.)

The *Church of Palm Springs* court then found particularly salient a passage from *Hull Church*, *supra*, 393 U.S. at page 449 against the involvement of civil courts in religious controversy. As we have noted in this opinion, that passage did *not* mandate "neutral principles" as distinct from principle of government. (Read carefully, the passage said that the formal title doctrine was *one way* of avoiding entanglement in religious controversies; the only hard and fast rule was that civil court must not resolve disputes over church property in a way that requires them to resolve "'controversies over religious doctrine.'")

Here are the salient parts of the passage from *Hull Church* quoted by *Church of Palm Springs*. The emphasis is ours: "'[T]he first amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which *can* be applied without "establishing" churches to

which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes *without resolving underlying controversies over religious doctrine.* Hence, States, religious organizations, and individuals must structure relationships involving church property *so as not to require the civil courts to resolve ecclesiastical questions.*'" (*Palm Springs, supra*, 89 Cal.App.3d at p. 920-921, quoting *Hull Church, supra*, 393 U.S. at p. 449, italics added by us, ellipses and brackets chosen by *Church of Palm Springs* court.)

After the long passage from *Hull Church*, the *Church of Palm Springs* case addressed the *Serbian Orthodox* opinion, which, as we have seen, used the *Watson* rule. The court recognized that the *Serbian Orthodox* opinion "held the decisions of the ecclesiastical tribunals final and conclusive." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 921.) And that makes sense, given that the primary focus in *Serbian Orthodox* was on the right to ecclesiastical office, as distinct from control of church property.

But then the court took a turn that is harder to understand. After the passage dealing with *Serbian Orthodox* case, the *Church of Palm Springs* court read *Watson* the great dispositive enunciation of the

organizational theory, as having really, and improperly, intruded into ecclesiastical doctrine. (See *Church of Palm Springs, supra*, 89 Cal.App.3d at p. 921.) Speaking of the *Watson* case, here is the passage from *Church of Palm Springs*, omitting parallel citations, and with our italics: "However, again contrary to appellants' arguments, the decision in *Watson v. Jones* even in its pristine state did not preclude civil courts from adjudicating church disputes that are essentially property disputes only incidentally involving or arising out of ecclesiastical disputes. In *Watson v. Jones* the court was asked to decree the termination of an implied trust because of alleged departures from doctrine by the general church. (See *Presbyterian Church v. Hull Church, supra*, 393 U.S. at p. 445 . . . .) *Thus the dispute involved in the case was purely ecclesiastical. The court would have been required to determine what the orthodox doctrine was, what changes in doctrine had been made, and whether such changes as were found constituted such substantial or fundamental departures from the orthodox doctrine as to constitute a violation of the trust.* (See *Presbyterian Church v. Hull Church, supra*, 393 U.S. at pp. 449-450 . . . .) Thus the court was called upon 'to determine matters at the very core of a religion -- the interpretation of particular church doctrines and the importance of those doctrines to the religion." (*Palm Springs, supra*, 89 Cal.App.3d at pp. 921-922, italics added.)

Now, that is a most novel reading of *Watson*, given that *Watson* had tried to get civil courts away from implied trust theory and toward a principle that would recognize "no heresy." (See *Watson, supra*, 80 U.S. at p. 728 ["The law knows no heresy,

and is committed to the support of no dogma. . . . "].) And it does not do justice to the deference shown *Watson* by the United States Supreme Court in not only *Serbian Orthodox*, but in *Hull Church*, the concurring opinion in *Eldership*, and even in *Jones*. Indeed, it appears that *Church of Palm Springs* was using *Hull Church* to retroactively recast *Watson* solely as an ecclesiastical office case and not what it was -- a property dispute case. The *Church of Palm Springs* court also provided no original source citations from *Watson* for its idea that *Watson* was wading in to matters "at the very core of . . . particular church doctrines."

After the passage on *Watson*, the court next turned its attention to three of the main California Supreme Court cases, *Committee of Missions*, *Horsman*, and *Wheelock*, making the point that the first two (*Committee of Missions* and *Horsman*) involved "clearly ecclesiastical" disputes. (*Palm Springs, supra*, 89 Cal.App.3d at p. 922.) It appears that the *Church of Palm Springs* court was trying to convey the idea that *Committee of Missions* and *Horsman* were bad law in light of *Hull Church*. That interpretation is supported by the next passage, dealing with *Wheelock*.

Wheelock, according to the *Palm Springs* court, applied "general principles of trust law and concluded that the fund of money should be apportioned on the same basis as that suggested by the presbytery and its commission" and therefore it had followed "'neutral principles of law.'" (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 923.)

With the absolute greatest respect for the panel in *Church of Palm Springs*, we must conclude that

its reading of *Wheelock* (as well as its summary dismissals of *Committee of Missions* and *Horsman*) was incorrect. As we have seen (and we have quoted the appropriate passages from *Wheelock*), the *Wheelock* court was applying the *Watson* principle of government to a dispute over a particular fund: Because the appropriate governing authorities had apportioned the fund in a certain way, the civil courts had to respect that apportionment.

From there the *Church of Palm Springs* court turned its attention to the case before it, recognizing that the property dispute "arose out of an underlying controversy involving largely questions of religious doctrine." (*Palm Springs, supra*, 89 Cal.App.3d at p. 923.) Juxtaposing the religious origins of the dispute against the resolution of the dispute by the civil courts, the *Church of Palm Springs* court enunciated four propositions: "However, the dispute to be decided by the court in this case is essentially a property dispute; the only relationship between the religious controversy and the dispute in the case at bench is that the latter arose out of the former; the property dispute may be resolved without the necessity of becoming involved with or attempting to resolve the underlying ecclesiastical controversy; and the trial court acted with the propriety in determining the case on the basis of 'neutral principles of law' and 'formal title' doctrine." (*Palm Springs, supra*, 89 Cal.App.3d at p. 923.)

The first three of those propositions seem correct, even if one uses the principle of government rule from *Wheelock*. The fourth proposition -- that the trial court acted correctly in deciding the case based on neutral principles and "'formal title'"

-- does not follow under the rule of stare decisis. Whatever other merits the approach might have had, it was not the common law of California as articulated by our Supreme Court.

Things became curiouser as the court rounded the bend and came to the top of page 924 in the official reporter, which is the part of the opinion which undertook to rebut the loser's arguments. At this point, the court noted that the general church was trying to "analogize" its case to the "*Serbian Orthodox*, *Horsman*, and *Wheelock* cases." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 924.)

Well, yes, obviously. In each of those high court cases, the civil court had looked at the organizational structure of the church involved to determine the property dispute. If that rule were to be applied to the facts in *Church of Palm Springs*, the general church might -- and the "might" rather than a "would" is important -- win.

The *Church of Palm Springs* court then characterized the three cases this way: "As already indicated, the controlling questions in those cases *turned on* disputes directly involving religious doctrine or church polity, organization or structure." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 924, italics added.)

Again, with all respect for the *Church of Palm Springs* panel, that statement was not correct. None of those cases "turned" on "religious doctrine" as such, except insofar as *organizational structure* is seen to be itself a matter of religious doctrine. We note, though, that there is only one case in our entire survey of the case law in the area where organizational structure was an actual matter of *controversy*.

(*Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396 (*Concord Christian*).) And in that case the appellate court easily surmounted the issue without involvement in religious dogma, but that case is getting ahead of ourselves. In any event, it appears that the *Church of Palm Springs* court was conflating religious controversy with "polity, organization or structure."

From this one might expect the coup de grace to be administered: The *Church of Palm Springs* court would flat out repudiate the principle of government as a guiding principle for civil courts, look to title, note that title was in the hands of the local church corporation, and affirm the judgment. But no. Mid-paragraph, the *Church of Palm Springs* court changed direction, and instead of repudiating the principle of government, embraced it in a kind of odd way, engaging in the sort of lengthy exploration of internal church structure that the California Supreme Court had undertaken in *Committee of Missions*. That is, the *Church of Palm Springs* court devoted the latter half of page 924 to making the point that, organizationally, the departure of the local church had been accepted -- practically ratified -- by the general church. (See *ibid.* ["When Presbytery acted on June 8, 1968, to suspend the powers of the Community Church session effective June 30, 1968, Community Church had *already* terminated its relationship with UPCUSA and withdrawn from the Presbyterian denomination. It is undisputed that a *local church within UPCUSA may withdraw and terminate its affiliation*. . . . Community Church has renounced its affiliation with the Presbyterian denomination and does not claim to be a Presbyterian

church. . . . Community Church ended that controversy when it withdrew from UPCUSA and terminated its relationship with the Presbyterian denomination." (*Palm Springs, supra,* 89 Cal.App.3d at p. 924.)

In short, the *Palm Springs* case was not being decided by simple title, but by the sort of technical twist on the loser's position that would have made Shakespeare's Portia proud: In effect, the *Palm Springs* court said to the general church: Oh, so you want this case decided by your own organizational rules, do you? Well fine. Under your own rules a local church may withdraw, and you are therefore stuck with that result.

At this point in the opinion (beginning with page 925), the organization of the *Church of Palm Springs* opinion again changes gears (the opinion is written without any subheadings), with the court going into the mode of batting down various arguments raised by the appellants, i.e., the general church.

First was an argument that a judgment for the local church would infringe on the general church's free exercise rights. (*Church of Palm Springs, supra,* 89 Cal.App.3d at p. 925.) That one was easy, the court simply needed to allude to the various U.S. Supreme Court cases that said it was all right to resolve "property disputes involving religious organizations so long as that resolution does not depend on the court's attempting to resolve ecclesiastical controversies." (*Ibid.*)

Then came the argument that a "hierarchical structure" meant "as a matter of law," that local church property was to be "held in trust for the general church." (*Church of Palm Springs, supra,* 89

Cal.App.3d at p. 925.) The court waded into the *Wheelock* case and announced that the *Wheelock* rule "in fact supports the position of Community Church." (*Id.* at p. 926.) The court referenced the language in *Wheelock* that had noted that the *members* of both churches that had split by the higher level of organization "'were beneficiaries of the trust before the Presbytery divided the church and in justice and equity must stand in the same position after division.'" (*Palm Springs, supra*, 89 Cal.App.3d at p. 926.) Hence, according to the *Palm Springs* court, "In essence what the [*Wheelock*] court was saying was that the directors or trustees of the corporation hold title to the property of the church in trust for the local church and every member thereof." (*Ibid.*) And then later, "Thus, properly read, *Wheelock* stands for the proposition that the property of a local church, even one that is part of a general church organization of hierarchical structure, is held in trust by the religious nonprofit corporation for the benefit of the local church congregation." (*Palm Springs, supra*, 89 Cal.App.3d at p. 927.)

Again, with respect to the *Church of Palm Springs* court, we must disagree with its reading of *Wheelock*. The *Church of Palm Springs* court confused the principle by which the *tribunal of a hierarchical church* had *itself* decided to apportion the fund in *Wheelock* with the rule of decision used by the court in deciding the *Wheelock* case. The rule of decision of the court in *Wheelock* was *deference* to the Presbyterian tribunal, not the (radical) idea that, as a matter of law, a local congregation of a hierarchically-structured church necessarily holds local property in trust for members of the congregation.

Next the *Church of Palm Springs* opinion addressed language in *Committee of Missions*, then *Horsman*, then *Watson* itself, all involving holding property in trust. This section of the *Church of Palm Springs* opinion is not the clearest in the opinion (there seems to be a kind of partial dialog with the appellant's briefs), but it appears that the main point is that none of those cases had embraced a "trust theory" of hierarchical structure. And of course that point was thoroughly correct, since, as the *Church of Palm Springs* court itself recognized, *Watson* had indeed broken with the implied trust theory that had dominated resolution of disputes since the early 1800's, and which had represented the British rule. Here is the passage: "Moreover, the effect of *Watson v. Jones* was the rejection or repudiation of the very doctrine that appellants appear to invoke -- the implied trust doctrine holding that church property was the subject of an *implied trust* in favor of those who adhered to the faith of the founders of the church." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 928, italics added.)

Obviously there was some confusion, either in the briefs or by the *Church of Palm Springs* court, between Lord Eldon's discredited implied trust theory and the principle of government approach that *Watson* had used to replace it.

Indeed, there is a good case to be made that the confusion was the product of poor briefing by the appellant general church. Apparently the general church there had advanced a tedious argument contending for an implied trust "with their contentions based on the First Amendment and the *Serbian Orthodox* and *Watson v. Jones* decisions" -- so much so

that it was "difficult to organize" those arguments "for meaningful discussion." (*Church of Palm Springs, supra*, 89 Cal.App.3d at p. 929.)

4. Barker

In a moment, the decision in *Church of Palm Springs* had reversed about a hundred years of state and federal Supreme Court precedent, and disturbed what had been a stable legal universe in California involving the methodology by which California state courts would decide church property disputes. It had recast *Wheelock* for as standing for the principle of majority rule, and consigned *Horsman Watson* and *Serbian Orthodox* to the bin of cases solely confined to religious controversies qua religious controversy.

The next intermediate appellate decision regarding church property, *Barker*, built on the *Church of Palm Springs* foundation, but expressly did not examine it: It was prepared to accept the "comprehensive analysis" contained in *Church of Springs* at face value. (See *Barker, supra*, 115 Cal.App.3d at p. 614 ["We next turn to California law to determine what legal principles California courts employ to resolve disputes over church property. Fortunately, we have the benefit of the comprehensive analysis of the problem in the court's opinion written by Justice Kaufman in" *Church of Palm Springs*].) That is, the *Barker* court flat out rejected the principle of government approach (which it called "Hierarchical Theory") because the *Church of Palm Springs* "opinion places California law squarely in the neutral-principles camp." (*Barker, supra*, 115 Cal.App.3d at p. 614.)

The *Baker* court next rejected implied trust theory, but that was easy to do since the four U.S. Supreme Court cases preceding *Church of Palm Springs* had done so. (See *Barker, supra*, 115 Cal.App.3d at pp. 615-620 [ending with observation that the difficulties of the theory "remain insurmountable"].)

The *Barker* court reached its result by plying the four-factor neutral principles approach, which it considered "Express Trust" theory. (See *Barker, supra*, 115 Cal.App.3d at p. 620-624.) Applying the four factors, the *Barker* court held that three of four disaffiliating Episcopal congregations in the Los Angeles Diocese -- yes, the very same diocese who is the appellant here -- were entitled to have control of the local church property, because in the cases of those local parish corporations, they took title to the property before the 1958 local diocesan canon which asserted that local Episcopalian parishes held property in trust for the diocese. The property of the fourth corporation, however, was indeed held in trust because the articles of incorporation of that particular corporation acknowledged a trust. (See *id.* at pp. 625-626.)

The four-factor neutral principles approach requires an examination of not just the deeds and articles of incorporation, but also of the constitutions, canons and rules of the general church. Usually, of course, a hierarchical church is going to have at least a canon or rule, if not a full-scale provision in its constitution, subordinating property of local church corporations to itself. By the time Barker was decided, the 1958 local diocesan canon had been promulgated. Why didn't it make a difference?

The issue was addressed on page 624 of the official reporter: The 1958 diocesan canon wasn't around when the three winning church parishes were incorporated, so there was "nothing . . . to create an express trust in local church property in favor of the general church." (*Barker, supra*, 115 Cal.App.3d at p. 624.)

It bears noting that Justice Roth dissented in *Barker*, and specifically recognized that, under the U.S. Supreme Court decision in *Jones*, the "hierarchical approach would also be acceptable." (*Barker, supra*, 115 Cal.App.3d at p. 627 (dis. opn. of Roth, J.).) He then pointed out that the majority "accomplish[ed]" the change from hierarchy to neutral principles "by virtue of the fact that the State of Georgia" had "availed itself of the neutral principles theory" together with the "assertion" that the *Church of Palm Springs* court had placed California in that "'camp.'" (*Ibid.*) For Justice Roth, the *Church of Palm Springs'* assertion was an "overstatement," though he did not elaborate. (*Ibid.*)

Turning to the merits, Justice Roth proposed that whether neutral principles or hierarchy should apply would "depend on the circumstances" (*Barker, supra*, 115 Cal.App.3d at p. 627 (dis. opn. of Roth, J.)), and the circumstances of the case were such that even if "no express trust affirmatively" appeared, the hierarchical structure of the Episcopal Church should be "the controlling consideration." (*Id.* at p. 628.)

F. Statutory Developments

1. Section 9142

The next legal development in California's law in this area was statutory, namely the addition of sub-

divisions (c) and (d) to section 9142. (See Stats. 1982, ch. 242.)

There is no indication that in doing so the Legislature had any intention of codifying *Barker*, or of overturning California Supreme Court precedent as found in the *Baker-Wheelock* line. The legislative history[8] of the addition to section reveals a rather different intent altogether: To make a technical correction to earlier (and pre-*Barker*) legislation (specifically, Stats. 1980, ch. 1324), which had *precluded* California's Attorney General from enforcing charitable trusts of religious corporations but left no one else with the ability to enforce such a trust either. That earlier legislation had left a "void" as far as the enforcement of property held in trust by religious corporations, and the 1982 additions to section 9142 were part of a package to "fill" that "void." (See, e.g., Policy Committee Memorandum re Bill SB 1178, Amended 3-8-82, from the Assembly Judiciary Committee, at p. 2 ["First Freedom, the sponsor of this bill, states that section one of the bill is intended to 'fill a void' left by the passage of SB 1493 (Petris), Ch. 1324, Statutes of 1980."].)

In more specific terms, the origins of the legislation that led to subdivisions (c) and (d) in section 9142 can be traced to events described by the court in *People ex rel. Deukmejian v. Worldwide Church of God, Inc.* (1981) 127 Cal.App.3d 547 (*Deukmejian v. WCG*).

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[8] The court has already granted a request by parties in a related case to take judicial notice of the legislative history of Senate Bill 1178 which originated the addition of subdivisions (c) and (d) to section 9142.

In that case "certain members" of a "hierarchically structured" church contacted a New Jersey law firm "expressing their concern that officials of their Church might be guilty of malfeasance and misfeasance with respect to Church affairs." (*Deukmejian v. WCG, supra,* 127 Cal.App.3d at p. 550, and 550, fn. 2.) The New Jersey firm contacted a California lawyer for assistance.

The California lawyer determined that the complaining church members themselves had no "standing to sue," so he contacted the California Attorney General's office whose duties at the time included "surveillance of charitable trusts." (*Deukmejian v. WCG, supra,* 127 Cal.App.3d at p. 550) The Attorney General's office then "deputize[d]" the California lawyer as a "special deputy attorney general." The office and the California lawyer took the position the church's "property, assets and records were 'public' and that they were always and ultimately in the custody of and subject to the supervision of the courts upon application of the Attorney General." (*Id.* at p. 551.) Based on that theory the California Attorney General's office and the California lawyer were successful, for a while, in imposing a receivership on the church on the ground that the "Church property was being misappropriated." (*Id.* at p. 552.)

However, as the receivership continued into the first half of 1979, the church obtained relief in the Legislature. Senator Nicholas Petris introduced Senate Bill 1493 which repealed the statutory basis (former section 9230) on which the Attorney General had acted. Old section 9230 was replaced with new legislation (also numbered section 9230) which provided, with certain exceptions, that "the Attorney

General shall have no powers with respect to any corporation incorporated or classified as a religious corporation under or pursuant to this code." (See *Deukmejian v. WCG, supra,* 127 Cal.App.3d at p. 554, fn. 5.) Senator Petris' bill became law and was signed by the Governor in July 1980.

The *Deukmejian v. WCG* court would later note that "[e]ven though the legislation was not to become effective" until about a year later, "the Attorney General very wisely viewed that legislation as a declaration of public policy and a legislative objective to prevent the state from engaging in the very type of litigation" the Attorney General had brought. (*Deukmejian v. WCG, supra,* 127 Cal.App.3d at p. 555.) These events were memorialized by the court when the California lawyer sought fees from the church for having imposed a receivership on the church, the denial of which the appellate court affirmed, noting that the whole receivership enterprise was "from the inception constitutionally infirm and predestined to failure." (*Id.* at p. 558.)

Senate Bill 1493 in 1980, which had proved decisive in the *Deukmejian v. WCG* litigation, was the stated reason for 1982's Senate Bill 1178, also carried by Senator Petris. The legislative history of the bill shows that the original sponsoring organization was First Freedom (a fact noted, for example, on the Senate Judiciary Background Information form ("SB 1178 (Petris)").

According to a memo from that organization (attached to the Judiciary Committee Background Information form), section 1 of the bill, amending section 9142, was to allow *some* litigation to enforce charitable religious trusts, since the earlier bill had

stripped the Attorney General of that authority: "The Attorney General used the term 'charitable trust' as a means of arrogating unto [*sic*[9]] himself virtually absolute power over all charitable organizations (including churches). SB 1493 deprived him of such overreaching authority . . . . [¶] However, while SB 1493 impliedly addressed the question of what a 'charitable trust' is not, it did not address what a 'charitable trust' really is." There really is such an animal, and attorneys who litigate in the area of gifts and bequests feel it's a void that should be filled." (Memorandum by Brent Barnhart to Burt McChesney, attached to Senate Judiciary Background Information form ("SB 1178 (Petris)").)

The void to be filled (and here we meet again the spirit of Justice Harlan's concurring opinion in *Hull Church*) was the then-inability of church *members* to seek redress when their contributions were used in a manner contrary to the specific purpose for which the property was contributed. (See letter from Brent A. Barnhart, Legislative Advocate, to Governor Edmund G. Brown, on First Freedom stationary dated June 7, 1982 at p. 1 ["SB 1178 accomplishes two things pertaining to court actions to enforce the terms of donations to a church: [¶] (1) It defines when gifts and contributions to a church create an enforceable charitable trust; and [¶] (2) It creates a new cause of action for church members who have

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[9] The King James era archaism is arguably in keeping with the religious liberty purposes of sponsoring organization, "First Freedom," whose April 16, 1981 newsletter is part of the legislative history materials. (See First Freedom newsletter of April 16, 1981, p. 1 ["those concerned with religious freedom and the rights of churches, look to FIRST FREEDOM for support"].)

contributed money or property to their church for a specific purpose, where their contribution has been used in a manner contrary to the specific purpose for which it was contributed." (Original underlining.))

According to the same letter, the bill was the "product of extensive discussion and compromise between representatives of several religious organizations" which included the Catholic Archdiocese of Los Angeles, the Jewish Community Relations Council of Los Angeles, and the Pacific Union Conference of Seventh-Day Adventists as well as First Freedom. (*Ibid.*)

It is apparent from the legislative history of Senate Bill 1178 that the Legislature's main focus was on the problem of what remedies individual contributors to religious corporations, no matter how ecclesiastically organized, might have for the misuse of their "specific purpose" contributions. The April 16, 1981 newsletter from First Freedom (on page 2) contained in the legislative history also contains a description of Senate Bill 1178, elaborating thusly on the issue of specific purpose contributions, and tying the effort to the Attorney General's perceived overreaching in the *Deukmejian v. WCG* case: "Senator Nicholas Petris, author of SB 1493, has introduced clean-up legislation which should lay to rest further misuse of the term 'charitable trust'. . . . [¶] SB 1178 declares what a charitable trust is, with respect to religious organizations. Enforceable charitable trusts will be those expressly established by donors in gifts to churches, *on condition that the gifts be used in specific ways*." (Original underlining; italics added.)

However, it must be noted that (as one might expect given the origins of SB 1493 enacting a new section 9230), the power of an individual contributor to enforce a specific purpose gift against a religious corporation was somewhat restricted. (Recall from *Deukmejian v. WCG, supra,* 127 Cal.App.3d 547, that the California attorney sought out by the New Jersey law firm concluded that individuals had no standing to enforce their allegations of malfeasance.) A writing at the time of the donation expressly creating a trust would be required.

As we have noted, one looks in vain in the legislative history of subdivisions (c) and (d) for any reference to the *Barker* decision (much less any intent to codify it), or any intent to reverse the common law of California dealing with church property disputes arising in the context of a struggle over property between a local church and a general church that was the subject of so much California Supreme Court common law jurisprudence. Any impact that the legislation may have had on that common law must therefore be by operation of the *plain language* of the statute, because there is certainly no indication of any legislative intent to do so. As our Supreme Court has declared, courts should not interpret a statute to "alter the common law" under there is "language or evident purpose of the statute" manifesting "a legislative intent to repeal" a common law rule. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.[10])

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[10] Here is the complete text of the relevant passage from *California Assn. of Health*: "As a general rule, '[u]nless expressly

With that principle in mind, let us now turn to the language of section 9142.

Subdivisions (c) and (d) of section 9142 provide:

"(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless *one* of the following applies:

"(1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.

"(2) Unless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member*, so expressly provide.

"(3) Unless, and only to the extent that, *the donor expressly imposed a trust, in writing, at the time of the gift or donation.*

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provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. . . . "A statute will be construed in light of common law decisions, unless its language "'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . .'" Accordingly, ' [t]here is a presumption that a statute does not, by implication, repeal the common law. . . . Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.' . . . Thus, the Department's position that the duties of long-term health care licensees are nondelegable under section 1424 is in accord with the common law of licensee liability, and *we will presume it to be correct unless the language or evident purpose of the statute manifest a legislative intent to repeal the rule.*" (*California Assn. of Health, supra*, 16 Cal.4th at p. 297, italics added.)

"(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or *governing instruments creating the trusts.* However, nothing in this subdivision shall be construed to permit the amendment of the articles to delete or to amend provisions required by Section 214.01 of the Revenue and Taxation Code to a greater extent than otherwise allowable by law." (Italics added.)

The major phrases of the statute are important: The very footfalls of *Watson's* reference to "subordinate member of some general church" echo in the statutory phrase "superior religious body or general church." We note:

First, there are three possible ways for a religious charitable trust to be enforced, any "one" of which will do. This aspect is important because it means that there is more than one way a trust can be impressed on property held by a religious charitable corporation. The most obvious way, of course, is the one described in subdivision (c)(3): an individual donor expressly imposing a trust, in writing, on his or her donation.

However, under the canon of statutory construction that courts should not construe words in statutes to be redundant, the way described in subdivision (c)(2) -- a "superior religious body or general church" expressly providing for a trust -- must be considered meaningfully different from the imposition of a trust by an individual donor in writing as described in subdivision (c)(3).

Second, one must note the disjunctive "*or*" that separates the phrase, "the articles or bylaws of the corporation" from the words "governing instruments

of a superior religious body or general church." Under the ordinary meaning of the word "or" -- either of two alternative are sufficient -- it makes no difference if the "bylaws or articles" in a *church corporation* holding *title* to property expressly provide for a trust as long as the "governing instruments" of the "superior religious body or general church of which the corporation is a member" so provide.

Third, one should note the phrase "superior religious body or general church" in conjunction with the word "or." The phrase clearly contemplates an intent by the Legislature to insure that hierarchically organized churches had the power to trump "local corporations" *when* the local corporation was a "member" of the hierarchically-organized church as to whether an enforceable trust might exist. If the Legislature had wanted the local church corporations to have the power to prevent hierarchically-organized churches from imposing a trust on the property of the local church corporations, it would not have used the word "or." The Legislature would have said "and," thus requiring *both* local corporation and general church agreement.

Finally, we come to the critical phrase in subdivision (d), "governing instruments creating" the trust. The phrase raises the question of what, exactly, are those "governing instruments" that "create" the trust.

Now the importance of subdivision (c)(3) becomes apparent. Governing instruments can certainly, under subdivision (c)(3), include the "writing," made by the donor at the time of the gift or donation. That is a logical reading of subdivision (c)(3).

However, since subdivision (c)(3) is not the exclusive way by which a trust may be enforced, the natural reading of subdivision (c)(2), when read together with subdivision (c)(3), is that "governing instruments" as used in the more general subdivision (c) *also* includes the "governing instruments of the superior religious body or general church" as the phrase is used in subdivision (c)(2). And that means that, yes, it is the general church or superior religious body that, indeed, creates the trust under subdivision (c)(2).

Of course, that very scenario -- the general church and not the local church as the actual trustor of the trust -- had been invited by the United States Supreme Court in *Jones*. Recall that *Jones* suggested an alternative to modification of deeds or corporate charters to insure that "the faction loyal to the hierarchical church will retain the church property." (*Jones, supra*, 443 U.S. at p. 606.) Specifically, the alternative was that the "constitution of the general church can be made to recite an express trust in favor of the denominational church." (*Ibid.*) The idea that a hierarchical general church could expressly provide in *its* rules that the property of a local church affiliated with that denominational church was held in trust for the denominational church thus does not seem to be as outlandish as the *California-Nevada* court would later find it.

We need not (and do not) in this opinion address issues arising out of subdivision (c)(3) scenarios (i.e., an individual suing to impress a trust based on a specific purpose donation). What is abundantly clear, however, for our purposes in this case is that in a hierarchically organized church, the "general

church" *can* impress a trust on a local religious corporation of which the local corporation is a "member" *if* the governing instruments of that superior religious body so provide.

In the case before us, the enactment by the national Episcopal Church in 1979 of Canon I.7(4) readily qualifies as a "governing instrument" expressly providing for a trust on property held by local church corporations. The language of the statute *perfectly* conforms with the result that would be otherwise required under a flat-out "principle of government" approach under *Watson* and the *Baker-Wheelock* line of California Supreme Court cases. And the *Barker* case becomes readily distinguishable because it was decided before Senate Bill 1178, with its contemplation of express trusts to be found in the "governing instruments" of a "general church."

Also, because of Canon I.7(4), we are spared in this case the thorny constitutional issue of whether section 9142 might be unconstitutional as applied to a hierarchically organized church whose governing instruments *didn't* have any express trust provision on the theory that the hierarchically organized church's own religious freedom to organize itself as *it* deemed fit is being subverted by the statute. We do not express any opinion on that question.

Now, the counter-analysis to what we have determined to be the plain language of section 9142, subdivisions (c)(2) and (d) is the proposition that it would be counter to ordinary state law trust principles, which in California start with the presumption that a trustor creating a trust retains the power to revoke it. To get ahead of ourselves, that would be

the rationale latter used by the court in *California-Nevada, supra,* 121 Cal.App.4th 754.

There is nothing wrong with the trustor-may-revoke rationale of *California-Nevada* -- after all that is what subdivision (d) literally provides for -- just as long as one is clear about who, exactly, *is* the trustor. But, as we have just seen, a "general church" *is*, functionally, the trustor is a subdivision (c)(2) situation.

But that is only common sense anyway: In a general church that is hierarchically-structured, people do not organize local congregations as *substantively* independent entities. They organize local congregations in the context of membership in the overall church. In contrast to congregational organization, hierarchical organization makes the overall church the primer mover.

2. The Title Presumption of Evidence Code Section 662

As we shall see when we discuss *Korean United's* treatment of *Church of Palm Springs*, one can detect in *Church of Palm Springs* a very strong emphasis on legal title. Indeed, *Korean United* would ascribe the rationale of *Church of Palm Springs* almost entirely to a reliance on "bare title." (See *Korean United, supra*, 230 Cal.App.3d at p. 498 ["Focusing instead on *bare title* to the property . . . ."] (italics added).)

That raises the question of how the title presumption in California law, now codified as section 662 of the Evidence Code, fits in church property

disputes of this sort.[11] It is true that section 662 was enacted in 1965, after the Supreme Court's *Baker-Wheelock* line of cases. But there is nary a hint that the statute was enacted to change the common law involving church property disputes, in which, typically, *title* is never really disputed, only the *use* of the property. The Law Revision Commission Comment to the legislation points out, "Section 662 codifies a common law presumption recognized in the California cases." (29B West's Annot. Evid. Code, p. 210.) And that presumption had been around prior to the *Baker-Wheelock* line. (E.g., *Roman Catholic Archbishop of San Francisco v. Shipman* (1889) 79 Cal. 288, 296 ["It must be presumed that Alemany held possession under the legal title vested in him by the deed. . . ."].)

Moreover, at least in this case, any arguable idea that section 662 somehow required departure from the result required by principle of government rule is untenable for three reasons.

First, section 9142 is a more specific statute, as well as a later one, and trumps any conflict with Evidence Code section 662. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476-477.) If the diocese and national church have valid claims under the plain language of section 9142, the more general Evidence Code section 662 cannot block them.

Second, particularly when read in conjunction with section 9142, Canon I.7(4) *is* clear and convinc-

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[11] The one-sentence statute provides in its entirety: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

ing evidence rebutting any presumption that the beneficial interest in the local church property is solely controlled by the local parish corporation.

And third, and most importantly, Evidence Code section 662 is substantially irrelevant to the dispute in this case. In precise terms, the diocese's and national church's claims are not that *they* have "beneficial title" to the property, but that the party who *does* have beneficial title, the local parish corporation, holds that beneficial title in trust for them.

And with that we now turn the decisions that followed after *Church of Palm Springs* and *Barker*.

G. The Latter-Day California Intermediate Appellate Decisions in the Wake of Church of Palm Springs, Barker, and Section 9142

Since *Barker* was decided and section 9142 was enacted, four cases from California's intermediate appellate court have directly dealt with disputes over church property in a way that implicates *Watson* and the *Baker-Wheelock* line's principle of government approach: *Korean United*, *supra*, 230 Cal.App.3d 480; *Singh v. Singh* (2004) 114 Cal.App.4th 1264 (*Singh*); *California-Nevada*, *supra*, 121 Cal.App.4th 754; and finally, *Concord Christian*, *supra*, 132 Cal.App.4th 1396.[12] A fifth case, *Berry v.*

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[12] One other case deserves mention as rounding out the law over church property disputes though it did not implicate the principle of government rationale of *Watson* and the *Baker-Wheelock* line. *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, another chapter in the history of the Serbian Orthodox Church, is not *directly* significant for our purposes since its main point was that the trial court was correct in sustaining a demurrer brought by a minority of a local congrega-

Society of Saint Pius X (1999) 69 Cal.App.4th 354 (*Saint Pius X*), is also significant because, although it did not deal with a church property dispute as such (it dealt with who was the proper successor in a corporate sole), it marked a rediscovery of the Supreme Court's *Wheelock* opinion and (in our opinion) a correct reading and application of that opinion.

Also, while all four direct dispute cases *professed* to follow the four-factor neutral principles approach, at least two (*Guardian Angel* and *California-Nevada*) cannot be reconciled with each other. When we examine them, we also find that two cases are consistent with the *Watson* principle of government approach, and in fact *Korean United* actually used that approach as an alternative rationale. (The other is *Guardian Angel*.) One isn't consistent (*California-Nevada*), and one is neutral (*Singh*).

1. Korean United

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tion opposing reaffiliation with the "Mother Church." However, the case does illustrate the point that looking to "by-laws" to resolve a property dispute (as in "neutral-principles analysis") may not always prevent a civil court from entangling itself in religious controversy. In *Vukovich*, the congregational minority made an argument that, on its surface, was merely about voting procedure under the by-laws. The minority asserted that the votes of about 20 to 30 members of the congregation should have been counted on the vote on reaffiliation, but the board had improperly refused to count them. (*Vukovich, supra*, 235 Cal.App.3d at pp. 286-287.) The trial court refused to entertain their suit i.e., sustained a demurrer because the court lacked jurisdiction, noting that "this dispute clearly involves an essentially ecclesiastical dispute" (*Vukovich, supra*, 235 Cal.App.3d at p. 290.) Does that mean if property *were* involved the court would have had to wade into the by-laws? We need not deal with that problem in this case.

Against the backdrop of *Palm Springs* and *Barker*, *Korean United* represents a kind of counter-reformation, in which California courts were willing, once again, to defer to the highest governing tribunals of a church.

Korean United involved a local Presbyterian congregation, incorporated as a religious nonprofit corporation. A "schism" developed within the local congregation over the views of its pastor; the pastor had the support of the majority of the congregation, and the pastor sought to disengage himself and his supporters from the national Presbyterian church; the "dissident faction" went elsewhere to worship, but the local presbytery (equivalent to a Episcopal diocese) declared this "'exiled'" faction to be the "'true Church'" congregation (like *Horsman*, the court in *Korean United* showed no reticence to use the phrase), the local pastor fired the first shot with a quiet title action, followed by a cross-complaint from the local presbytery for enforcement of an express trust. The trial court followed *Barker* and held there was no trust, declaring the local congregation corporation in control of the church property.

The appellate court reversed. The court was nice to the earlier *Barker* decision: That opinion represented, at the time, "not only the latest, but the most definitive appellate consideration of the legal principles concerning church property disputes in California." (*Korean United, supra*, 230 Cal.App.3d p. 496.)

That said, the *Korean United* headed off in a direction fundamentally inconsistent with *Barker*. First of all, unlike *Barker* (or *Church of Palm Springs*), *Korean United* became the first California appellate court to recognize that *Jones* was *permis-*

sive in its articulation of neutral principles analysis. State law could use the four-factor neutral principle test, and that was okay, but states could also defer to the rulings of the "authoritative ecclesiastical body" at least as far as religious controversies were involved. Here is the key passage: "The conclusion to be drawn from *Jones* is that a state court *may* resolve disputes over church property through use of neutral principles of law, focusing on sources such as deeds to church property, articles of incorporation, bylaws, state statutory law and the constitution and rules of the general church; but if a civil court is required to resolve a religious controversy, it must then defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." (*Korean United, supra*, 230 Cal.App.3d at p. 498.)

The *Korean United* also confronted the ruling in *Church of Palm Springs* and politely and obliquely criticized it: That is, the *Korean United* said that the *Church of Palm Springs* court "accepted" the "invitation to resolve church property disputes through application of neutral principles of law" (*Korean United, supra*, 230 Cal.App.3d at p. 498) but noted its ruling was based on a rather constricted focus on bare title: "Focusing instead on *bare title* to the property, the [*Palm Springs*] court upheld the trial court's ruling that ownership and possession of the disputed church property remained with the local church." (*Ibid.*, our italics, citing *Church of Palm Springs, supra*, 89 Cal.App.3d at pp. 923, 933).

Later in the opinion, however, the *Korean United* court made it clear that the trial court had "misapplied" the four neutral principles factors to rule in favor of the local church, because the trial court "im-

properly looked at each of the factors separately to see if an express trust was present in any one of them. However, the court, as a matter of law, should have looked at these factors *collectively*, asking whether under the totality of the circumstances, they required a finding of express trust." (*Korean United, supra*, 230 Cal.App.3d at pp. 509-510, italics added.)

The implication of *Korean United* is clear, if politely stated: If the trial court had erred in *Korean United* by looking at the four-factors separately, rather than collectively, then how much more did the *Church of Palm Springs* court err in only looking at one factor individually, that is, "bare title." And if there is one mistake the *Korean United* court was determined not to make, it was to constrict its focus to one factor separately and base its decision to reverse only that factor.

Structurally, one can divine from *Korean United* a host of parallel rationales, all of which were rolled up into a ball and hurled toward an overwhelming resolution: The trial court erred.

The first rationale was based the re-discovery of the principle of government approach. Justice Fred Woods and his colleagues became the first jurists on the intermediate appellate court in decades to apply the rationale of the controlling precedent of the state's highest court to a church property dispute. In a section of the opinion citing *Wheelock*, *Horsman*, *Kedroff*, and *Serbian Orthodox* (see *Korean United, supra*, 230 Cal.App.3d at pp. 500-503), the *Korean United* court held that the trial court had erred in "fail[ing] to defer" to the decision of the presbytery, which was authoritative under the Presbyterian con-

stitution known as the "Book of Order." (*Korean United, supra*, 230 Cal.App.3d at p. 502.)

However, as an independent alternative rationale the *Korean United* court then down the line on each factor of the four neutral principles (see generally *Korean United, supra*, 230 Cal.App.3d at pp. 503-513), including the operation of the Corporations Code sections that folded the rules of the national church into the bylaws of the local corporation controlling the property, and creating the presumption of an express trust. (*Id.* at pp. 503-509.) Another rationale was the nature of the deeds, because the Presbytery had held the property in its own name before a 1983 loan. (*Id.* at pp. 509-510.) Further, the articles of incorporation had expressly noted a statute that itself recognized the power of "national" bodies over "subordinate" ones (old Civ. Code § 605dd, part of stats 1939 ch. 148 § 2, p. 1262). (See *Korean United, supra*, 230 Cal.App.3d at p. 511.)

And, finally, there was the national constitution of the Presbyterian Church embodied in its Book of Order that had been amended in the wake of *Jones* to provide that local congregations hold property in trust (*Korean United, supra*, 230 Cal.App.3d at p. 512).

2. Saint Pius X

About eight years after *Korean United*, the court in *Saint Pius X, supra*, 69 Cal.App.4th 354 had occasion to confront the issue of church property disputes in the context of the arcane subject of corporate soles (see Corp. Code, §§ 10000 through 10015).

The classic model for a corporate sole is an Archbishop in the Roman Catholic Church who is

himself a corporate sole, owning property in a given diocese. (E.g., *Roman Catholic Archbishop of San Francisco v. Superior Court* (1971) 15 Cal.App.3d 405, 411 ["The Archbishop is a corporation sole under the California Corporations Code . . . ."]; see also Nadborny, *"Leap of Faith" Into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate* (2005) 13 Am. Bankr. Inst. L. Rev. 839, 848 ("Nadbourny Bankruptcy Article").) The basic idea is that a single individual, as a subordinate in a hierarchically organized church, can own church property in a given area yet the *church* still ultimately controls the property by controlling the officeholder. (See Nadbourny Bankruptcy Article, *supra*, 13 Am. Bankr. Inst. L. Rev. at pp. 848, 850 ["The corporation sole was developed in England for the express purpose of passing the use of church property to successive generations at the parish level in order to prevent the monarch from seizing church properties upon the death of the bishop . . . . [¶] The fact that legal title rests in the hands of the bishop as a corporation sole does not change the Canonical ownership as ordained by the Catholic Church."].)

And it was precisely the problem of who exactly controlled a corporate sole that came to the fore in *Saint Pius X*. The case involved the followers of Archbishop Marcel Lefebvre, who in the words of the opinion, practice "Roman Catholicism as it existed before Vatican II," that is, they were an "independent" church. (*Saint Pius X*, *supra*, 69 Cal.App.4th at p. 358) A particular priest had formed a corporation sole in 1976. The original articles of incorporation provided that any vacancy would be made by the

"presiding Archbishop following the canons of the Roman Catholic Church." (*Ibid.*) However, the priest later attempted to change the manner of succession so that he would control his successor.

Not so, said the *Saint Pius X* court after the original priest died, and two successors, the original priest's hand-picked successor and one chosen by the larger church, vied for control of the church property: The appellate court focused on section 10010 of the Corporations Code governing corporate soles, which contemplates filling vacancies "'by the religious organization governed by the corporation.'" (See *Saint Pius X, supra*, 69 Cal.App.4th at pp. 366-367.)

The court first noted that a "'principal purpose of the corporation sole is to insure the continuation of ownership of property dedicated to the benefit of a religious organization which may be held in the name of its titular head.'" (*Saint Pius X, supra*, 69 Cal.App.4th at p. 367, quoting *County of San Luis Obispo v. Ashurst* (1983) 146 Cal.App.3d 380, 383 (*Ashurst*).) The court's central point was that, under California law, a corporation sole and the religious organization using the corporation sole as a legal device are *not* one and the same, so that the individual office holder does not control the succession to the property, it is, instead, the larger religious organization. (See *Saint Pius X, supra*, 69 Cal.App.4th at p. 370 [rejecting argument that original priest was "synonymous with the religious organization governed by the corporation"].)

The *Saint Pius X* court relied heavily on the *Ashurst* decision, which was an execution sale case, based on a debt for medical services provided by a

county to the wife of the office holder of a corporate sole. Writing for the court and quoting Blackstone, Justice Gilbert noted the "severability of title and ownership as between the unincorporated religious organization and the individual officeholder as the corporation sole." (*Ashurst, supra*, 146 Cal.App.3d at p. 384.) That is, "the assets must remain with the religious organization" once title has vested in the office holder as corporate sole. The county thus could not obtain a writ of execution on the assets of the corporation sole to satisfy the debt for medical services of the office holder's wife. (See *id.* at pp. 384-385.)

And, perhaps most important for our purposes, *Saint Pius X* continued with the rediscovery by California's lower intermediate level appellate courts of the proposition from *Wheelock* that religious corporations are not to be confused with the ecclesiastical bodies to which the corporation may be ecclesiastically subordinate. Here is the key passage from *Saint Pius X*, noting the original "convenience" language from *Wheelock*, and adding its own emphasis: "As the trial court observed, in the early case of *Wheelock* . . . (although not involving a corporation sole) the Supreme Court explained the relationship of a religious corporation to the congregation or church membership as follows: 'The . . . Code of this state . . . expressly permits religious bodies to incorporate, but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. *Notwithstanding incorporation the ecclesiastical body is still all important.* The corporation is a subordinate factor in the life and purposes of the church proper. A religious corporation

. . . is something peculiar to itself. Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church. . . . . "The legislature never means by granting or allowing such charters to change the ecclesiastical status of the congregation, but only to afford them a more advantageous civil status. """ (*Saint Pius X, supra*, 69 Cal.App.4th at p. 371-372 (italics added by *Saint Pius X* court).)

3. Singh

Singh, supra, 114 Cal.App.4th 1264, is significant for several reasons, not the least of which is that it was the first California case since the U.S. Supreme Court's 1979 *Jones* case to *systematically* review the federal precedents, including *Watson*, *Hull Church*, *Serbian Orthodox* as well as *Jones*. (See *Singh, supra*, 114 Cal.App.4th at pp. 1275-1281.) *Church of Palm Springs* had cited those cases to be sure, but it hadn't taken them on one by one. Perhaps because of that systematic review, the *Singh* court declared that it did not "necessarily agree" with the idea that certain California cases "decided in the 1950's" -- which certainly included both *Rosicrucian, supra*, 39 Cal.2d 121 and *Providence Baptist, supra*, 40 Cal.2d 55 -- could *not* "be reconciled with the United States Supreme Court holdings." (*Singh, supra*, 114 Cal.App.4th at p. 1281, italics added.)

The case is also significant because it was, functionally, a homage to *Providence Baptist*, that is, it yielded exactly the result that a reading of *Providence Baptist* would predict for a congregationally organized church using the principle of government.

The *Singh* case was, of course, a little more complex than that: It arose out of the claims of two competing boards (called "the Supreme Council") in a Sikh Temple. The losing slate essentially contended that they had been elected for life, in accordance with what they claimed was the proper Sikh tradition. The temple was congregationally organized, with an elected board, but (shades of the British Parliament in the time of Charles I) the otherwise detailed bylaws did not address the question of how long the board was to serve. Since the temple had organized itself as a "nonprofit religious corporation" subject to the rules set for in section 9110 et seq. of the Corporations Code (*Singh, supra,* 114 Cal.App.4th at p. 1282), the trial court had looked to section 9220, which provides that in the absence of any provision in the articles or bylaws, the term of office for a board of directors is one year. That determination, in effect, validated the claims of one slate of directors. The trial court also -- in the tradition of *Providence Baptist* that basically had done the same thing approved about 50 years before -- provided for a court supervised election.

The losing slate appealed; its core argument was that the trial court did not have *jurisdiction* to adjudicate the dispute at all. The bylaws did indeed make reference to "the Gurmat tradition" and the "Panj Pyaras" within the Sikh religion. (*Singh, supra,* 114 Cal.App.4th at pp. 1269, 1275.) It was in the context of discussing jurisdiction that the *Singh* court addressed the U.S. Supreme Court cases from the 1970's, as well as *Rosicrucian* and *Providence Baptist*. The court ultimately held that the trial court's decision to apply section 9220 was correct as

an application of neutral principles. There was no conflict between a neutral principles approach and the principle of government approach, because the principle of government of the Sikh temple *was* the local corporation (controlled by a board elected by majority rule) specified in the bylaws.

That point, however, requires a little more elaboration. There was no doubt in *Singh* that the controlling board was to be elected by majority rule. However, the court also noted that an article in the bylaws also made a particular priest the "chief consultant" in "matters related to the Gurmat and Sikh Rehatmaryada." (See *Singh, supra*, 114 Cal.App.4th at p. 1283, fn. 20.) Any "matter of doubt" was to be decided in a hierarchy of specified individuals. (*Ibid.*) That particular priest had not, however, spoken "regarding the term of office for the Supreme Council." (*Ibid.*) Hence, the *Singh* court took care, in justifying the trial court's decision to hold an election as *not* conflicting with any ecclesiastical hierarchy: "Further, the trial court did not determine who was qualified to be a member or who should be a member of the Supreme Council. Rather, the court's ruling that an election should occur resulted from the application of neutral principles of law and the Corporations Code when interpreting the bylaws. We stress that this case is significantly different from those situations where a religious authority has spoken on the issue. Not only has no religious authority spoken, but the Sikh Temple has no viable means of resolving this issue." (*Singh, supra*, 114 Cal.App.4th at p. 1285.)

In short, the *Watson* and *Baker-Wheelock* principle of government approach was beginning to recover

the respect it had lost with the *Metropolitan Baptist*, *Wilson*, *Church of Palm Springs* and *Barker* cases. The revival would continue with *Guardian Angel*.

4. Guardian Angel

Guardian Angel, *supra*, 118 Cal.App.4th 919 is an example of how neutral principles analysis which properly takes into account the written *constitution* of a hierarchical church (plus its canons and rules) will often yield the same result as a highest tribunal analysis. The case is also totally congruent with *Saint Pius X's* iteration of the *Wheelock* doctrine that church corporations serve as agents for churches that use them for its temporal ends.

The split between the local and the general church in *Guardian Angel* does not appear to have been theological at all. Rather, it was over financial accountability of the local church to the general church.

In *Guardian Angel*, a parish operated for about 39 years "in union" with the local diocesan bishop of the general church that operated "in union" with the Prime Bishop of the church back in Pennsylvania. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 929.) When a new diocesan bishop was appointed in 1999, he requested the local priest to provide him certain financial information. The local priest failed to do so. A new local board of directors was soon elected, and that board severed ties with the general church, even to the point of hiring security guards to prevent those parishioners who remained loyal members of the general church from entering the premises. (The new board even refused donations from loyalist members. (*Guardian Angel, supra*, 118 Cal.App.4th

at p. 926.) The general church constitution, however, required diocesan approval of any newly elected board, but it was clear that this newly elected board never got it. (*Ibid.*) The trial court found the property belonged to the local church, but the appellate court reversed.

The *Guardian Angel* court began with the premise that courts "must" apply neutral principles analysis, for which it cited page 449 of the *Hull Church* case, but only quoted a fragmentary clause from the *Hull Church* opinion. Here is what the *Guardian Angel* court said: "In settling a church property dispute, such as that currently before us, courts must apply 'neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which [the] property is awarded.' (*Presbyterian Church v. Hull* (1969) 393 U.S. 440, 449 [parallel cites omitted]." (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930.)

From there, it identified the usual four factors used in neutral principles analysis. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930, citing *Barker, supra*, 115 Cal.App.3d 599, 621.)

It then quoted *Metropolitan Philip* v. Steiger (2000) 82 Cal.App.4th 923, 932 for the proposition that a general church's constitution "'can override any right the majority of a local congregation might otherwise have to control the local church property.'" (*Guardian Angel, supra*, 118 Cal.App.4th at p. 930.)

Having established that a general constitution can trump "any right the majority of a local congregation" have in local property, disposing of the case was an easy matter. The general church constitu-

tion required diocesan approval of a local church's board of directors before that board was authorized to act. So the actions of the board in "expropriat[ing]" the local property were not authorized. (See *Guardian Angel, supra*, 118 Cal.App.4th at pp. 927, 930)

By the same token, the constitution of the general church (actually, there were two, a 1958 and a 1998 version) was clear that a parish only owns property "so long as" it conforms to the rules of the general church, and any dissolution of a parish will cause the property to revert to the national church. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 931).

The court further held that the reversion provision created a presumption of an express trust under section 9142, subdivision (c) of the Corporations Code. (*Guardian Angel, supra*, 118 Cal.App.4th at p. 931, citing *Korean United, supra*, 230 Cal.App.3d at p. 508, itself quoting from § 9142, subd. (c)(2).) That presumption was unrebutted by the mere fact that the *local* articles of incorporation did not "expressly" provide for reversion upon dissolution. (*Guardian Angel, supra*, 230 Cal.App.3d at p. 929.)

Our own previous explication of section 9142 is wholly consistent with that conclusion. We have already shown, because of the "or" in subdivision (c)(2), that a trust may be enforced under the statute even if there is no provision for it in the local church's bylaws or articles.

4. California-Nevada

Guardian Angel was filed in late April of 2004; by mid-August, however, another case would be added to those intermediate appellate opinions which came

down on the side of local control, *California-Nevada, supra*, 121 Cal.App.4th 754, sometimes also called "*St. Luke's*." Whereas *Saint Pius X* (quoting from *Wheelock*) and *Guardian Angel* (when provided for by the church constitution) had seen church corporations as distinct from and essentially subordinate to the religious organizations for which they were created, the *California-Nevada* court began with the local church corporation as the originating force behind subsequent property relationships.

Preliminarily, we must note that it is significant that the viability of the principle of government or so-called hierarchical approach was *not* before the court in *California-Nevada*. The court expressly noted that *neither party* was pressing such an approach and both parties operated on the assumption that it didn't apply. (*California-Nevada, supra*, 121 Cal.App.4th at p. 763 ["The parties here also appear to agree that the neutral principles of law theory is applicable in California, or at least that the hierarchical and implied trust theories do not apply."].)

It is clear from the opinion, though, that the *California-Nevada* court took it for granted that the "hierarchical theory" had been discredited, because that assumption played a role in its rationale, which was based on the proposition that a local church corporation in that case, like any trustor in California trust law, had the presumptive power to rescind a trust it had created. In direct contrast to *Guardian Angel* (see *California-Nevada, supra*, 121 Cal.App.4th at p. 771 [acknowledging the opinion to be "at odds" with *Guardian Angel*], the *California-Nevada* court explicitly rejected the idea that a general church's constitution could be dispositive, and did so on the

ground that it would merely re-import hierarchical theory back into California law. (See *id.* at p. 772 ["Although the hierarchical theory has supposedly been rejected in California, it will nevertheless live on under the label of 'neutral principles of law,' if a church's own rules are viewed as trumping state statutes."].)

On the other hand, it is further noteworthy that the *California-Nevada* court assumed that hierarchical theory was discredited *despite* its use by *Korean United* court. To be sure, the *California-Nevada* court did make it clear that it disagreed with the *Korean United* opinion on the question of whether section 9142 created any *presumptive* trusts in favor of a general church, finding *Korean United's* reliance on the Ballentine & Sterling treatise misplaced, because the statute itself does not use any variation of the word "presumed." (*California-Nevada, supra*, 121 Cal.App.4th at p. 770 ["*Korean United* . . . describes . . . 9142 as providing 'presumptive rules . . . .' This language appears to have come from a treatise . . . . Nothing in the statute itself, however, uses the word 'presumption' or 'presumed.'"].)

On the other hand, one doesn't find in the opinion any confrontation with the fact that *Korean United* had relied upon the organizational principle as one of its several independent rationales to decide in favor of the general church.

Rather, for the *California-Nevada* court, the analysis of the church property dispute was a relatively straight-forward trust problem: In 1948, a local Methodist church incorporated with the express purpose of holding the church property in trust for

benefit of the *local* church, albeit also with the purpose of maintaining a local church "as a part of and affiliated with the Methodist Denomination." (*California-Nevada, supra*, 121 Cal.App.4th at pp. 757-758.) When an (unspecified) doctrinal dispute arose in the United Methodist Church in 1999 and 2000, the Methodist bishop attempted to replace the (apparently popular) existing local pastor. The local pastor (or his supporters) locked out the new pastor. The regional conference of the general church and related entities then sued the local church corporation for breach of charitable trust. (*Id.* at p. 760.) The trial court reasoned that (a) a trust did indeed exist in favor of the general church and (b) the trust could not be unilaterally revoked by the local church corporation. (See *id.* at p. 761.)

The appellate court agreed with (a) -- finding substantial evidence to support the idea that certain properties were indeed held by the local church corporation in trust for the general church. But, applying the traditional California rule that trusts are revocable unless expressly made irrevocable by the trust instrument (*California-Nevada, supra*, 121 Cal.App.4th at p. 767, quoting Prob. Code, § 15400), it disagreed with (b). It held that the local church could keep the property by revoking the trust.

The syllogism used by the court went this way: The local corporation put some property into a trust for the general church. The trust instruments (in *California-Nevada*, certain deeds[13]) had created

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[13] The case involved nine parcels, the deeds to five of which had trust language in favor of the general church. In an analysis that followed the four-step neutral-principles factors, the *California-Nevada* court found there was substantial evidence that

trusts for the general church (the deeds going to the local church corporation), but those instruments did not contain any language making the trust expressly irrevocable. Under California trust law, that made them revocable. Moreover, the fact that the constitution of the general church expressly provided that local churches hold property in trust for the general church was of no significance. "We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner." (*California-Nevada, supra*, 121 Cal.App.4th at p. 769.) In essence, the *California-Nevada* court treated the local corporation as any other *initial* owner creating a revocable trust and wanting the property back.

The *California-Nevada* decision was also the first California decision in the church property dispute area to consider in any detail the impact of Corporations Code section 9142, enacted in 1982. (Although the statute had played a subsidiary role in the rationales of both *Korean United* and *Guardian Angel*.)

The *California-Nevada* court took the position that "various legislative history materials" including the digest of the Assembly's Third Reading of the bill indicated that the purpose of the bill was "'to limit a religious corporation's property subject to a charitable trust. It requires certain actions to take place in order for a gift of property to be considered a chari-

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the other four were intended to have such trust language and concluded that all parcels had been put into a trust for the benefit of the general church. (*California-Nevada, supra*, 121 Cal.App.4th at pp. 764-766.)

table trust.'" (*California-Nevada, supra*, 121 Cal.App.4th at p. 770, quoting Assembly Third Reading of Sen. Bill No. 1178 (1981-1982 Reg. Session.) Which was, as we have shown, correct.

However, the *California-Nevada* court also concluded, in construing subdivisions (c) and (d) in section 9142, that those subdivisions were enacted to, in effect, codify *Barker*. After pointing out that nonowners cannot create trusts in their favor, the court said: "A more reasonable reading of the statute is that subdivision (c)(2) was intended to be a codification or recognition of *Barker, supra*, 115 Cal.App.3d 599. This is especially so since subdivisions (c) and (d) were enacted shortly after *Barker* was decided. *Barker* was decided in January of 1981. Subdivisions (c) and (d) of Corporations Code section 9142 were enacted in 1982, and took effect in 1983." (*California-Nevada, supra*, 121 Cal.App.4th at p. 769.) That is, the court was rejecting the notion that a general church can "create a trust, in favor of itself" by amending its constitution or rules to so provide. (*Ibid.*)

The *California-Nevada* court provided no authority for the idea that subdivisions (c) and (d) were enacted to codify *Barker*. We have already demonstrated in great detail that the idea is incorrect.

5. Concord Christian

And now we come to the latest church property dispute in California to date, *Concord Christian, supra*, 132 Cal.App.4th 1396. *Concord Christian* is remarkable in that it confronted what appears to be the main (potential) difficulty with the *Watson* principle of government approach, namely whether it

would require a civil adjudication of whether a church really was hierarchical or congregational. That adjudication might, in turn, implicate the civil court in theological controversy.

It bears emphasizing that in all the cases we have reviewed in this opinion, we have encountered no real disputes over the question of the *nature* of the church's organization. In *Concord Christian*, however, there had been an actual dispute over whether the denomination with which the secessionist local church had been formerly affiliated was hierarchical or congregational. The issue had been "'vigorously dispute[d]'" in the trial court with substantial evidence coming from "both sides." (*Concord Christian, supra*, 132 Cal.App.4th at p. 1409.)

However, as it turned out, there was no occasion to wade into religious controversy at all: The constitution and by-laws of the general church plus the *history* of the local congregation and the "actions of the parties" (for example, by the secessionist pastor acknowledging the authority of the denomination before the split) provided not only substantial evidence to support the trial court's finding that the denomination was hierarchical, but also established that the local congregation had never been a "'strictly independent'" church "free of other ecclesiastical associations." (See *Concord Christian, supra*, 132 Cal.App.4th at pp. 1409-1411.)

Like other post-*Barker* appellate opinions, *Concord Christian* operated on the premise that California law *is* the "neutral principles of law" approach, but seemed to equate the principle of government approach *with* such neutral principles. Consider this passage: "California courts apply the neutral princi-

ples of law approach, taking care in resolving church property disputes not to make determinations of underlying controversies over religious doctrine and polity. [Citations.] Accordingly, even where the matter at issue in a church dispute involves questions of ownership of property and assets, *civil courts applying neutral principles of law must defer to the authoritative decisions of hierarchical ecclesiastical bodies on any matters of internal church polity necessarily involved in resolving the issue.* [Citations.]" (*Concord Christian, supra,* 132 Cal.App.4th at p. 1412, italics added.) The same sentiments might just as easily have been expressed by our state's high court in *Wheelock, Committee of Missions,* or *Horsman.*

H. Application

The rule of stare decisis reminds us that that common law is usually not the product of any one particular decision only, but of many generations of jurists focusing on a particular problem. In the case before us, for example, we have now ascertained that the approach articulated by the highest court in this state -- directly in *Baker, Wheelock, Committee of Missions, Horsman* and *Providence Baptist,* and indirectly in *Rosicrucian Fellowship* -- has never been overruled or occluded by decisions of the United States Supreme Court. We have demonstrated that the federal supreme court has done nothing to affect the viability of these cases.

Of course, as a matter of state law (apart from matters of constitutional law), the Legislature can supersede decisions of a state's highest court. And yet we have also seen that nothing the Legislature has done would affect the principle of government

approach in this case, where clear and convincing evidence exists that the "governing instrument" of a "general church" expressly impresses a trust on the property of a local church corporation.

In short, both stare decisis (at least in this case with Canon I.7(4)), *and* the proper construction of section 9142, coterminously favor the position of the general church. It is clear, then, that the trial court erred as to the second prong, going to the merits, of the anti-SLAPP statute in dismissing the case.

Now, it is not uncommon for appellate courts to bolster the result in a case before them by explaining that an alternative rationale leads to the same result. That happened in *Korean United*, where the court used the approach dictated by stare decisis (the principle of government) and then also reached the same result under the four-factor neutral principles approach.

In this case, however, we have decided that we should not engage in that sort of overkill. To be plain: Under the California Supreme Court cases of *Baker*, *Wheelock*, *Committee of Missions*, *Horsman*, and *Providence Baptist* (which are consistent with *Rosicrucian Fellowship* as well), the right of the general church in this case to enforce a trust on the local parish property is clear, and that right has not been affected by intervening United States Supreme Court decisions or any statute enacted by the Legislature. To the degree that section 9142 alters the common law rule enunciated by these cases, that alteration *duplicates* the result required under the common law given the facts of this case.

V. DISPOSITION

The judgments of dismissal against the diocese and the national church are both reversed. Further proceedings shall be consistent with this opinion. Appellants shall recover their costs on appeal.

SILLS, P. J.

WE CONCUR:
MOORE, J.
FYBEL, J.

APPENDIX C

TRIAL COURT JUDGMENTS

September 9, 2005

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

Coordination Proceeding Special Title (Rule 1550(b))

EPISCOPAL CHURCH CASES

Included Actions:
Rasmussen v. The Rev. Praveen Bunyan;
Adair v. The Rev. Jose Poch; and
O'Halloran v. The Rev. William A. Thompson.

JUDICIAL COUNCIL COORDINATON PROCEEDING NO. 4392

Orange County Case No. 04CC00647 and
Los Angeles County Case Nos. BC321101 and BC321102

Assigned for All Purposes to The Hon. David C. Velasquez, CX-101

STATEMENT OF DECISION AND ORDER ON *RASMUSSEN* DEFENDANTS' SPECIAL MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT AS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

[Cal. Code Civ. Proc. § 425.16]

Date Action Filed: September 7, 2004

Defendants' Special motion to Strike the First Amended Complaint (Anti-SLAPP) in the Rasmussen Case: *Granted without leave to amend.*

I. Evidentiary Rulings

The court has considered all evidentiary objections, and they are overruled except as specifically ruled upon as follows:

A. Declaration of David R. Tumilty:

¶ 3 sustained as hearsay and lack of personal knowledge. The witness does not state the basis of his personal knowledge of what occurred in 1947, whether he was present at the purported meeting of the members of the parish or whether he recognizes the signatures of the purported signatories to Exhibit A.

¶ 7 sustained as hearsay and lack of personal knowledge, and improper legal opinion. The witness does not state the basis of his personal knowledge of how the parish has conducted its affairs in the prior 55 years or in 1991.

¶ 10 sustained in part. The phrase, "made clear its intention to retain the real property of the Episcopal Church and Diocese" is speculation, hearsay and lacks personal knowledge.

¶ 16 sustained as irrelevant.

B. Declaration of George W. Cummings:

¶ 5 sustained as irrelevant and as improper legal conclusion.

¶ 6 sustained as irrelevant.

¶ 9 sustained in part as to the phrase "and shall be conveyed to the Diocese upon dissolution of a parish" as irrelevant. No evidence has been presented that the parish has dissolved.

C. Declaration of Rev. Dr. J. Robert Wright:

¶¶ 2(a), (b), (c), and 3, are irrelevant.

¶ 4, a hypothetical, is irrelevant. The witness has also been called upon to opine "[w]hether. . . a parish holds its property in trust for use in furthering the mission of its diocese and the Episcopal Church." As such, the question calls for impermissible legal conclusion.

¶¶ 11 and 12 are irrelevant.

¶ 14 is sustained as to the second sentence starting, "Thus, all clergy," and ending, "canons of the Church," as irrelevant.

¶ 16 is sustained as to the second sentence starting, "In short," and ending, "of the congregation" as improper legal conclusion and irrelevant.

¶ 17 as irrelevant and improper legal conclusion.

¶ 18 is sustained in part from the first sentence through "Sec. 3" as irrelevant and improper legal opinion.

¶ 19 is sustained as to the first through third sentences starting with the words, "Sections 2 and

3," and ending, "enforced by the civil courts," as irrelevant and improper opinion.

¶ 20 is sustained as irrelevant. There is no evidence that the property has been encumbered or alienated.

¶¶ 22 through 46 are sustained as irrelevant and improper opinion.

II. Discussion of the Merits

Plaintiffs allege the defendants have "wrongfully seized control of St. James Episcopal Parish, . . . prevented the faithful members from worshiping [there] and diverted Parish assets to their own use. Defendants have prevented the true leadership of the Parish from exercising its authority and, instead, have attempted to affiliate the Parish with a non-Episcopal church in Uganda." (First Amended Complaint ("FAC"), ¶ 1.) All of the instant causes of action, except breach of contract, promissory estoppels and unjust enrichment, are based on the assertion the defendants hold parish property under an express trust for the benefit of plaintiff the Protestant Episcopal Church in the Diocese of Los Angeles ("the Church") pursuant to the Canons of the Church, incorporated into the parish's articles of incorporation and bylaws. Plaintiffs claim the defendants are wrongfully withholding possession of the parish property from the "true members" of the parish. Plaintiffs contend defendants breached the terms of the trust when defendants announced they were severing their ties with the Church and claimed the right to sole management and control of parish property, to the exclusion of the Church, because of an

ecclesiastical dispute over "core doctrinal issues" of the Church. (FAC ¶¶ 2-3.) Plaintiffs allege defendants purported to amend the parish bylaws in March 2004 to exclude all references to the Church. (FAC ¶ 63.) They assert the amendment of the parish bylaws and articles of incorporation were illegal. (FAC ¶ 91(g).) Defendants are alleged to have "betrayed" the Church. (FAC § VI.B.) Plaintiffs allege that some members of the Church have expressed disagreement with the consecration of a homosexual bishop, but have kept such expression within the Church. "Defendants, however, chose a different path." (FAC ¶¶ 69 and 70.) "Rather than pursue their dissent through religious channels," defendants have "conspired, plotted and schemed" against the Church. (FAC ¶ 70.) Plaintiffs allege that defendants Bunyan, Menees and Adams violated their ordination vows, and canonical and California law "by pledging their loyalty to the ecclesiastical authority of the Church of Uganda." (FAC ¶ 72.) Defendants allegedly refused to distribute a Bishop's letter urging the dissenters to return to the flock "and instead used [the parish] to make unfounded statements to the public that [the Church is] 'unbiblical' or 'unorthodox.'" (FAC ¶¶ 79-80.) In August 2004, defendant Bunyan announced his disaffiliation from the Church and issued a press release announcing he will no longer be affiliated with the Church. (FAC ¶ 74.) Following that, the Church, through its bishop and counsel, sent a letter to defendants "requesting they obey the conclusive rulings of the Episcopal Church, surrender control of the real and personal property of the Church, and allow faithful Episcopalians to worship at the Parish." (FAC ¶ 84.) But, it

is alleged, defendants refused all requests. (FAC ¶ 85.) Defendants are alleged to have denied plaintiffs access to parish records and use of parish property, and have stopped sending money to the Diocese. (FAC ¶¶ 86 and 88.) Before seceding from the Church, defendants had platted and conspired to misappropriate Church property, solicit donations in the name of the Church and solicit members of the Church to disaffiliate from it. (FAC ¶ 107.)

As relief, plaintiffs seek a declaration from the court that the Church has already determined who are the loyal members of the Church and true members and leaders of the parishes, and who has the right to control and manage parish property. Plaintiffs seek a declaration of the court that parish property is held in trust in favor of the Church and irrevocably dedicated for use by the Church. Plaintiffs seek restoration of the property under the guidance of the "lawful Priest-in-charge" and a declaration the amended articles of incorporation are invalid. Plaintiffs seek a declaration that the Church owns and controls the "Church Corporation" comprised of the "Priest-in-Charge, Wardens and Vestry of the Parish." Plaintiffs want defendants enjoined from interfering with the right of the Church and the rightful members of the parish to freely use and enjoy the property. Plaintiffs seek an accounting, damages and costs.

Under the provisions of the anti-SLAPP, a cause of action that arises from the defendant's acts in furtherance of the right of petition or free speech, in connection with a public issue, is subject to a special motion to strike, unless there is the probability that plaintiff will prevail on the merits. A defendant's

threshold burden is to demonstrate that the plaintiff's action arose from the defendant's protected constitutional speech or petition rights. (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 76.) A defendant carries its initial burden under the anti-SLAPP if it makes a *prima facie* showing the lawsuit "arises" from defendant's exercise of free speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 89; *Equilon v. Consumer* (2002) 29 Cal. 4th 53.) A lawsuit "arises" from a defendant's exercise of the right of free speech or petition if the acts on which the lawsuit is based were "in furtherance" of the defendant's exercise of free speech or petition rights. (*Governor Gray Davis v. American,* (2002) 102 Cal. App. 4th 449, 456.) The phrase "'cause of action ... arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citation.]" (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal. App. 4th 1388, 1398.) Once the defendant makes such a showing, the burden shifts to the plaintiff to produce *prima facie* evidence of its claims. (*CCP* § 425.16(b)(1); *Governor Gray Davis v. American*, 102 Cal. App. 4th, *supra*, at 456; and *Walker v. Koussis* (2001) 93 Cal. App. 4th 1432.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (*CCP* § 425.16(b)(2).)

As used in the anti-SLAPP, "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" includes: (1) any written or oral statement or writing made before [an] ... executive, ... or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by [an] ... executive, ... or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*CCP* § 425.16(e).)

One of the purposes of the anti-SLAPP is to encourage continued participation in matters of "public significance." (*CCP* § 425.16(a).) "To this end, this section shall be construed broadly." (*Id.*)

Is the complaint subject to the anti-SLAPP?

The court does not find that the filing of the parish's amended articles of incorporation constitutes a statement or writing made before an executive, or other official proceeding authorized by law. Nor does it qualify as a statement or writing made in connection with an issue under consideration or review by an executive, or other official proceeding authorized by law. (*CCP* § 425.16(e).) The filing of the amended articles of incorporation is purely ministerial in nature. Such an act does not occur in the context of a

"proceeding" within the meaning of the anti-SLAPP, nor does it involve any official consideration or review, or the exercise of official discretion.

However, the court finds the defendants have carried their initial burden by presenting *prima facie* evidence the acts on which the lawsuit is based were in furtherance of defendant's exercise of free speech in connection with a public issue. The terms of the anti-SLAPP are to be broadly construed to protect not only literal speech but also any act designed to further a person's right to free expression, including expressive conduct and nonverbal acts to advance the person's right to free speech. (*CCP* § 425.16(b)(1).) See *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635.) The court finds defendants have made a *prima facie* showing they are being sued for acts arising from and in furtherance of their publicly expressed disagreement with the Church's views concerning the consecration of homosexual clergy, specifically by voting to break ties with the Church, by amending the parish's articles of incorporation, and submitting a press release announcing the reasons for the separation. Such acts arise out of and are in furtherance of the defendants' exercise of the right to speak on a matter of "public interest."

Defendants have presented sufficient evidence from which it can be inferred that but for their actions disassociating themselves from the Church's views on religious doctrine the lawsuit would not have been filed. It is the gravamen of the complaint which governs whether the anti-SLAPP should apply. (*Navellier v. Sletten, supra.*) The root of the instant controversy is defendants' public disaffiliation from the Church over doctrinal issues rather than

simply an alleged change in the control of the property. In reading the complaint, it is quite clear that the acts which are the basis of the lawsuit arise from defendants' rejection of the Church's doctrinal views and public announcement of disassociation from the Church. For example, the complaint alleges "[d]efendants ... violated their ordination vows ... by pledging their loyalty to the ecclesiastical authority" of another church. Also, it is alleged "[d]efendants ... used the ... Parish to make unfounded statements to the public that the Episcopal Church, the Diocese and the Bishop are 'unbiblical' and 'unorthodox.'" Even plaintiffs' declarations in support of its opposition predominately concern defendants' alleged ecclesiastical wrongdoing and disloyalty to the Church in refusing to be bound by the rules of their former religious affiliation.

Further, the views expressed by the defendants concern matters of public interest. How churches in America are reacting to the different viewpoints on homosexuality is currently a topic of much public significance. The variety of religious perspectives on homosexuality, the degree to which gays may participate in church activity, and the ability of local congregations to separate from their larger affiliations because of their differing convictions on matters such as these are the subject of much public debate and discourse at the present time. It is a subject which has gained international attention in the news media. Therefore, because the steps taken by the defendants to disassociate themselves from the religious views of the Church constitute acts in furtherance of the exercise of defendants' rights to free

speech on a matter of public interest, the complaint is subject to a special motion to strike.

Have plaintiffs shown the likelihood of prevailing on the merits?

The court finds that the plaintiffs have not carried their burden to show they will probably succeed on the merits. To defeat the motion, plaintiffs must state a legally sufficient claim and must provide sufficient competent evidence to support a ruling in plaintiffs' favor on the merits. (*Walker v. Kioussis* (2001) 93 Cal. App. 4th 1432.) The trial court does not weigh the evidence, but must accept as true all inferences favorable to the plaintiffs. (*Dixon v. Superior Court* (1994) 30 Cal. App. 4th 733.) The court finds that plaintiffs have not established a legally cognizable claim supported by competent evidence.

In support of their claims, plaintiffs rely on legal propositions which are not the law in California. They contend the courts must defer to Canon law in resolving disputes over church property. (*See Jones v. Wolf* (1979) 443 U.S. 595.) In essence, plaintiffs' theory is that church law, principally Church Canon 1.7(4) and Diocesan Canon 3.05.1, creates an irrevocable trust over parish property. Plaintiffs allege that defendants and the historical leaders of the parish took an oath to obey and submit to the hierarchical authority of the Church. Church Canon 1.7(4) was enacted in 1979. No evidence has been presented of the date Diocesan Canon 3.05.1 was enacted. Plaintiffs further argue that the Church has already determined which congregants represent the

true Church with the right to possess and control parish property.

Plaintiffs urge the court to apply the "hierarchical theory" in determining which party has the right to control parish property. Under the "hierarchical theory," "centralized control over church property supercedes civil law disposition of church property. Under a hierarchical system of church governance the canons and rules of the general church override any disposition of local church property mandated by state law." (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker* (1981) 115 Cal. App. 3d 599, 606.) However, California courts are not bound by Canon law. And the hierarchical theory of resolving disputes over church property has been repudiated by California courts. (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker,* 115 Cal. App. 3d at 615.) Instead, California follows neutral principles of law in resolving church disputes over church property by relying on (1) the deeds to church property; (2) the articles of incorporation of the local church; (3) state statutes; and (4) the rules of the general church. (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, supra,* at 621.)

No evidence has been presented that a trust over parish property has been created under statutory law. *Corporations Code* § 9142 provides in pertinent part as follows:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:

> (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.
>
> (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.
>
> (3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

No evidence has been presented that the parish, its board or its governing documents contain an express commitment to place parish property in trust for the benefit of the Church.

According to the grant deed to the real property of the Saint James Parish, recorded July 3, 1950, and amended July 21, 1951, the property was granted for the valuable consideration of $100 by the Bishop of the Protestant Episcopal Church in Los Angeles, "a corporation sole," to the Rector, Wardens and Vestrymen of the Saint James Parish. Plaintiffs have not presented evidence that title to the parish property has ever been held in the name of any person or entity other than the parish since the time it was conveyed to the parish. There is nothing on the face of the deed suggestive of a trust in favor of the grantor. It is undisputed that any capital improvement or expansion of parish property was done only after approval by the Diocese. However, according to

the exhibits presented by the plaintiffs in opposition to the motion, the cost for the purchase of adjacent property and building construction was born solely by the parish. Further, the original articles of incorporation, filed March 1, 1949, do not expressly declare the creation of a trust over parish property in favor of either the Church or the Diocese, although the articles do incorporate the bylaws and articles of the church and diocese into the bylaws and articles of the parish. The parish articles of incorporation state the parish is a "constituent part" of the greater church, but does not state the parish is a "subordinate body" of the Church. (*Cf. Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, supra,* at 607-609 [articles of incorporation of St. Matthias, St. Mary's Church and Our Savior Church provide the parishes are "constituent" parts of the PECUSA but not a "subordinate body" of the larger church].) The 1991 amendments to the parish articles of incorporation add that the property of the parish is "irrevocably dedicated to religious or charitable purposes" without any specific mention of either the Church or the diocese.

In determining whether property is subject to an express trust, it is presumed that the person in whose name the legal title to property is recorded is the owner of the full beneficial title to the property. (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, supra,* at 605.) "Under neutral principles of law if a local body affiliated with a national body holds title to property in its own name and later secedes, the national body has little basis to claim that such property is held in trust for it. (Citation.) If a local organization secedes from one

national entity and affiliates with another, absent other factors no claim can be laid to property owned by and held in the name of the local organization.... In such instances valid claims may exist for *breach of contract,*... but ordinarily no express trust arises against the property of the local organization..., [T]he same is true of a local church organization which changes affiliation from one general church to another." (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, supra,* at 622, emphasis added.) Plaintiffs have not produced competent evidence of an express trust.

The court further finds that plaintiffs cannot support the cause of action for breach of contract. It is rather evident that the promises on which the breach of contract claim is based (FAC, ¶ 94) track the language described in the articles of incorporation of the Holy Apostles Church involved in the *Barker* case, namely, that the Holy Apostles Church is a "subordinate body" of the larger church whose property reverts to the national church upon surrender or revocation of the charter. (*Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, supra,* at 609-610.) But in the instant action, there is nothing in the St. James Parish's original articles of incorporation suggesting the founders of the parish promised to make it a subordinate body of the larger Church or that the property would revert specifically to the Church upon surrender or revocation of the parish charter. It is true that the parish's original articles of incorporation state that the Canon law and constitution of the Church shall be part of the parish's articles and bylaws. But nothing in the parish's articles of incorporation conveys the

idea that parish founders intended the local church to be a subordinate body of the greater Church. Further, nothing in either the original or amended articles of incorporation of the parish states that its property would revert specifically to the Church upon revocation of the parish charter. Under the "objective" rule of contract interpretation, the unexpressed intentions of the parties do not become terms of the contract between them. Thus, it cannot be said that the parish founders intended to incorporate the provisions of Canon 1.7(4) into the parish articles of incorporation decades before the Canon was even enacted.

There is no evidence the pre-incorporation association expressed to the Church a promise to make the parish a subordinate body of the larger Church. In fact the evidence is to the contrary. In the resolution of the Bishop's Committee of the St. James Mission, dated January 20, 1947, they state:

> We . . . respectfully request your permission to proceed with the organization of said mission into a Parish. ¶ We promise and declare that the said Parish shall be forever held under and conform to and be bound by the Ecclesiastical Authority of the Bishop of Los Angeles and of his successors in office, the Constitution and Canons of the Church now known as the Episcopal Church in the United States of America, and the Constitution and Canons of the Diocese of Los Angeles. (Declaration of David R. Tumilty, *Rasmussen*, Exhibit "A.")

No intent was therein expressed by the founding Bishop's Committee to make the parish a subordinate body of the greater Church.

Plaintiffs have not carried their burden of producing *prima facie* proof of their causes of action for promissory estoppels or unjust enrichment. An otherwise unenforceable contract may still be enforced if it was reasonably foreseeable that the promise of the promisor would reasonably induce the promise to either act, or refrain from acting, the promise is so induced, and injustice can be avoided only by enforcement of the promise. (1 *Witkin, Summary 9th* (1990) Contracts, § 323, p. 303.) "The oral agreement will be held binding, regardless of the absence of any representation by the defendant, if (a) the plaintiff, in reliance upon it, has so changed his position that *unconscionable* injury would be suffered, or (b) the defendant, having accepted the benefits of the oral contract, would be *unjustly* enriched by nonenforcement." (1 *Witkin, Summary 9th* (1990) Contracts, §325, p. 305, emphasis added.) In the present case, the court's attention is not drawn to any particular evidence which would support the inference that not enforcing the alleged agreement would result in an injustice, unconscionable injury or unjust enrichment. Even assuming, for purposes of argument, that plaintiffs were reasonably induced to change their position as the result of defendants' promise to "forever" be bound to Church law, the court is left to guess what evidence plaintiffs would offer in support of such findings.

Given the fact that the evidence of the deed to parish property, the articles of incorporation of the parish, and the rules of the general church will not

change, the court finds no reasonable likelihood that a viable cause of action can be stated by the plaintiffs to recover the property or damages related to the property. Therefore, leave to amend is denied.

IT IS SO ORDERED.

Dated: 09-09-05

/s/ David C. Velasquez
The Hon. David C. Velasquez
Judge of the Superior Court

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February 6, 2006

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

Coordination Proceeding Special Title (Rule 1550(b))

EPISCOPAL CHURCH CASES

Included Actions:

Rasmussen v. The Rev. Praveen Bunyan (Orange County Case Number 04CC00647);

Adair v. The Rev. Jose Poch (Los Angeles County Case Number BC321101); and

O'Halloran v. The Rev. William A. Thompson (Los Angeles County Case Number BC321102).

JUDICIAL COUNCIL COORDINATON PROCEEDING NO. 4392

Assigned for All Purposes to Hon. David C. Velasquez, Judge, CX-101

Complaints Filed: Sept. 7, 2004

STATEMENT OF DECISION AND ORDER ON *ADAIR, O'HALLOHAN* AND *RASMUSSEN* DE-FENDANTS' DEMURRERS TO PLAIN-TIFFS' IN INTERVENTION FIRST AMENDED COM-PLAINT IN INTERVENTION

Date Action Filed: September 7, 2004

Date: January 12, 2005
Time: 1:30 p.m.
Dept: CX101

Demurrers to First Amended Complaints in Intervention (Rasmussen, Adair and 0'Halloran):

Sustained without leave to amend.

The requests for judicial notice are granted.

To the extent the complaints in intervention seek declarations of the "status of [the local Churches'] as parish[s] of the Episcopal Church, [and] the identity of [the local churches'] true leadership" (First Amended Complaints in Intervention, ¶31 (All Saints') and ¶36 (St. David's), plaintiffs in intervention lack standing to sue. "A corporate outsider cannot bring suit to challenge a corporation's management or control. Only a shareholder, officer, or director has standing to do so. (See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations, § 127, p. 626.)" *(Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1083) Plaintiff in intervention does not satisfy any of those requirements.

As to plaintiff in intervention's second claim, insufficient facts have been alleged to state a cause of action for the imposition of an irrevocable trust in its favor. Despite the opportunity to do so, plaintiff in intervention has not added anything legally material to the First Amended Complaints in Intervention. None of the Articles of Incorporation or amendments thereto, refers to the defendant parishes as organizations "subordinate" to plaintiff in intervention. None of the grant deeds granting property to the defendant parishes refers to plaintiff in intervention, nor is there any mention of the intent of the grantors and grantee to impose a trust over any of the proper-

ties. No document has been alleged or brought to the court's attention in a request for judicial notice constituting a declaration of irrevocable trust, or transfer of irrevocable trust by deed or will in favor of the plaintiff in intervention. *(Califomia-Nevada Annual Conference v. St. Luke's United Methodist Church* (2004) 121 Cal.App.4th 754, 767.) Even if sufficient facts have been alleged to state a cause of action for implied trust, for purposes of argument, the vote of the parish boards of directors to disaffiliate from the national church constitutes a revocation of such trusts. (Id. at 768.) The court has nothing further to add in support of its ruling herein than was stated in its ruling of October 27, 2005, when the court sustained the demurrers to the initial complaints in intervention. Such rationale is incorporated herein.

Lastly, the individual board member defendants in the Rasmussen case assert they are immune as volunteers under the provisions of the federal Volunteer Protection Act (42 USC §§14501 et seq.) However, no facts appear on the face of the complaint from which it may be inferred that these defendants are volunteers.

IT IS ORDERED.

Dated: Feb. 6, 2006 /s/ David C. Velasquez
The Hon. David C. Velasquez
Judge of the Superior Court

APPENDIX D
ORDER DENYING REHEARING

Court of Appeal, Fourth Appellate District, Div. 3 –
Nos. G036096/G036408/G036868

S155094

IN THE SUPREME COURT OF CALIFORNIA

En Banc

EPISCOPAL CHURCH CASES

The request for judicial notice, filed January 29, 2009 is granted.
The opinion is modified.
The petition for rehearing is denied.

Filed Feb. 25, 2009.

/s/ George
Chief Justice

APPENDIX E

1. STATUTES, ETC. (IF NOT IN PETITION TEXT)
2. References in lower court record to where federal questions were raised??
3. COMPLAINT??
4. Any other matter we think is necessary??

(6)

No. 08-1579

Supreme Court, U.S.
FILED
AUG 26 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE RECTOR, WARDENS, AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION

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The Episcopal Church is an unincorporated association with no parent corporation or stock.

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INTRODUCTION

Apart from raising no substantive issues that warrant review, the Petition for a Writ of Certiorari should be denied on jurisdictional grounds because trial court proceedings remain ongoing and no final judgment will be entered until those proceedings have run their course. Petitioners acknowledge this, but seek to overcome this jurisdictional defect by relying on the fourth exception to the finality rule described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This exception does not apply because reversal on the grounds asserted in the Petition would not end the litigation, and declining immediate review would not "seriously erode" federal policy. Moreover, the California Supreme Court based its decision on independent state grounds.

Even were jurisdiction not lacking, there is no basis for granting certiorari:

- The neutral principles approach employed by the California Supreme Court to resolve this church property dispute was endorsed by this Court in *Jones v. Wolf* and has been adopted consistently by state courts to resolve similar disputes.

- The California Supreme Court's interpretation of California Corporations Code section 9142 follows existing United States Supreme Court authority enabling states to enact statutes governing church property disputes.

- There is no conflict among state courts regarding the constitutionality of section 9142 or any similar state statute. Nor is there any conflict among state courts as to whether general church rules should be considered in the application of neutral principles of law to a church property dispute.

- No clarification of the Court's holding in *Jones v. Wolf* is required here to address the question of how to determine whether a religious denomination is hierarchical or congregational because the California court did not characterize or analyze the nature of The Episcopal Church's governing structure. Based on St. James' own written commitments, the court concluded the Parish was bound by the rules of The Episcopal Church. In any event, there is no real dispute over whether The Episcopal Church is hierarchical. This has been repeatedly confirmed in a long, unbroken chain of judicial decisions.

- This case provides no occasion to address the question of whether courts should enforce denominational trust rules "unilaterally create[d]" and imposed by "canon fiat." Pet. 10, 20. The Episcopal Church's General Convention adopted Canon I.7.4 in 1979 by a majority vote through a democratic process involving delegates representing each parish, including St. James, 25 years before the dispute arose.

- Similarly, this case does not raise the question of whether a hierarchical church may receive favorable treatment not afforded secular organizations. The California Supreme Court's decision employed rules that apply equally to secular voluntary associations and charitable trusts.

- Finally, by upholding The Episcopal Church's trust interest, the decision reaches precisely the same result as the six other state courts of last resort that addressed this issue.

JURISDICTION

No jurisdiction exists to review the decision under 28 U.S.C. § 1257(a). No final judgment or decree has been rendered, and the parties continue to litigate in the trial court. The fourth exception to the finality rule described in *Cox Broadcasting Corp.* does not apply. *See infra* Part I.A. Moreover, the decision is adequately supported by independent state grounds. *See infra* Part I.B.

STATEMENT OF THE CASE

A. Factual Background

1. Structure of the Church.

The Episcopal Church ("Church") consists of approximately 7,600 worshipping congregations created

to carry out the Church's mission. New congregations are usually first formed as "missions." 1 A.A. 131; 3 A.A. 371; 4 A.A. 705-06.[1] If a mission meets criteria specified by its diocese, the diocese may admit it as a "parish" of the Church. 4 A.A. 709-12. Each parish is a subordinate part of the Church and the diocese in which it is located. 3 A.A. 371-72, 415, 427-28, 432, 435; 4 A.A. 701-02, 709-10.

All parishes are subject to the Church's three-tiered polity. Parishes are governed by a "vestry," consisting of the rector (an ordained Episcopal priest) and lay persons elected by the parish. 3 A.A. 371. Each parish is a part of the diocese in which it is located. Each diocese is governed by an "Annual Convention" of elected clergy and lay representatives from each parish. This body adopts and from time to time amends a diocesan Constitution and Canons, and elects a "diocesan bishop" who is the ecclesiastical authority within that diocese. 3 A.A. 371, 693-98, 700-01. All dioceses together make up the Church. The Church is governed by a "General Convention" composed of most of the Church's bishops and other representatives elected by each diocese. The General Convention has adopted and amends the Church's Constitution and Canons. 3 A.A. 371, 415-17, 424-26.

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[1] Respondents recognize the Court does not possess the full appellate record, but have included citations to Appellant's Appendix filed by The Episcopal Church in the California Court of Appeal and California Supreme Court.

The national and diocesan Constitutions and Canons are binding. 3 A.A. 371. Diocesan Constitutions require parishes to accede to the rules of the Church and dioceses as a condition of their formation. 3 A.A. 419; 4 A.A. 701-02. All clergy at ordination commit in writing to "solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church." Vestry members are required by Canon to "well and faithfully perform the duties of [their] office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised." 3 A.A. 421, 432.

2. Canons governing property.

The Church's Constitution and Canons govern both temporal and spiritual matters. Thus, the Canons contain numerous provisions restricting the use and control of parish property and governance of parishes to ensure that both the parish and its property will be used for their intended purpose—the Church's mission.

Aspects of the Church's policies regarding parish property are expressed in numerous canons. Canons II.6.2 and .3, adopted in 1868, prohibit parishes from "encumber[ing] or alienat[ing]" or "otherwise dispos[ing] of" consecrated property without consent of the diocese. 3 A.A. 375, 435. Canon II.6.1, added in 1871, makes clear that all consecrated property must be "secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with

this Church and subject to its Constitution and Canons." 3 A.A. 374-75, 435. Canon I.7.3, adopted in 1940, provides that a parish may not encumber or alienate real property, consecrated or unconsecrated, without consent of the diocese. 3 A.A. 375-76, 429.

Further tying parish property to the Church's mission, Canon III.9.5(a)(2), adopted in 1904, provides that "[f]or the purposes of the office [of rector] and for the full and free discharge of all functions and duties pertaining thereto, the Rector shall, at all times, be entitled to the use and control of the Church and Parish buildings together with the appurtenances and furnishings. . . ." 3 A.A. 374. Canon III.9.5(a)(1) makes clear the rector's responsibilities must be carried out subject to "the Book of Common Prayer, the Constitution and Canons of this Church, and the pastoral direction of the Bishop." 3 A.A. 452.

Finally, in 1979, in response to *Jones v. Wolf*, 443 U.S. 595 (1979), which invited hierarchical churches to adopt "express trust" provisions in their governing documents to ensure, in the event of a dispute, that local church property would remain with the denomination and its members, the Church adopted Canon I.7.4. It states, "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which [it] . . . is located." 3 A.A. 376, 429.

3. History of St. James Parish.

St. James was founded as an Episcopal mission in 1946. 4 A.A. 757-58. In 1947, the mission petitioned the Diocese of Los Angeles ("Diocese") for recognition as a parish, promising in writing that it would:

> be forever held under, and conform to and be bound by, the Ecclesiastical authority of the Bishop of Los Angeles, . . . the Constitution and Canons of the [Episcopal] Church . . . , and the Constitution and Canons of the Diocese of Los Angeles.

The Diocese accepted the petition and established St. James Parish. 3 A.A. 488.

Consistent with Diocesan requirements, St. James' Articles of Incorporation provided the Parish would:

> form a constituent part of the Diocese of Los Angeles in . . . the . . . Episcopal Church . . . ; and . . . that the Constitution and Canons, Rules, Regulations and Discipline of said Church . . . and the Constitution and Canons in the Diocese of Los Angeles, for the time being *shall . . . always form* a part of the By-Laws and Articles of Incorporation . . . and shall prevail against and govern anything herein contained that may appear repugnant to such Constitutions, Canons, Rules, Regulations and Discipline.

3 A.A. 503-04 (emphases added). In 1991, St. James amended its Articles, retaining provisions incorporating the Constitutions and Canons of the Church and Diocese. 3 A.A. 489, 511-12. Until the present dispute arose, St. James operated as a subordinate part of the Church, in conformity with the Constitutions and Canons. 3 A.A. 489, 517-626.

In August 2004, St. James' vestry and a majority of members at a congregational meeting voted to disaffiliate from the Church. 4 A.A. 760. On August 18, 2004, the Diocesan Bishop prohibited St. James' clergy from functioning as Episcopal priests, appointed a Priest-in-Charge, and recognized the Parish's remaining Episcopal members as St. James' continuing congregation. 3 A.A. 633-41, 654. Although they left the Church, the individual petitioners and other disaffiliated members, despite their earlier promises, sought to retain St. James' property for their own use as part of a different denomination. 4 A.A. 761.

B. Proceedings Below

On September 7, 2004, the Diocese and an individual member of St. James filed suit to recover the Parish property. The Church was granted leave to intervene and filed its complaint on October 18, 2004.

On petitioners' motion, the trial court struck the Diocese's complaint under California's "anti-SLAPP"

statute, California Civil Procedure Code section 425.16.[2] Cal. Civ. Proc. Code § 425.16 (West 2004). The court also sustained petitioners' demurrer to the Church's amended complaint without leave to amend.

Consolidating the separate appeals initiated by the Church and Diocese, the Court of Appeal reversed. The California Supreme Court affirmed the Court of Appeal, using a somewhat different analysis.

The California Supreme Court first decided a preliminary procedural question—whether California Code of Civil Procedure section 425.16 governed the action. It concluded petitioners failed to prove the lawsuit arose from any activity protected by the statute, and therefore the trial court erred in dismissing the Diocese's complaint. Pet. App. 8a-10a.

The court then addressed the merits of the church property dispute. It first concluded California courts should follow the "neutral principles of law" approach approved by this Court in *Jones v. Wolf*. Employing that approach, the court observed that "St. James Parish agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing

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[2] "SLAPP" stands for "Strategic Lawsuit Against Public Participation." The anti-SLAPP statute affords a mechanism to obtain early dismissal of suits brought to chill protected First Amendment activity and having no likelihood of success on the merits.

instruments." Pet. App. 30a. The court noted Canon I.7.4 expressly states that local church property is "held in trust" for the Church and the Diocese (Pet. App. 24a), and further that "earlier-enacted canons . . . [also] impose substantial limitations on the local parish's use of church property and give the higher church authorities substantial authority over that property" (Pet. App. 28a). Taken together, these "instruments make clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church." Pet. App. 30a.

The court held that this conclusion, reached under the neutral principles analysis, also was supported by California Corporations Code section 9142. Cal. Corp. Code § 9142 (West 2006). "[I]t would appear that this statute also compels the conclusion that the general church owns the property now that defendants have left the general church." Pet. App. 29a-30a. Finally, the court rejected petitioners' challenge to the constitutionality of section 9142, stating that "as applied here, the section is fully consistent with *Jones v. Wolf*, *supra*, 443 U.S. at page 606, and promotes the free exercise rights of persons to form and join a religious association that is constructed and governed as they choose." Pet. App. 35a.

REASONS FOR DENYING THE PETITION

I. NO JURISDICTION EXISTS TO REVIEW THE DECISION.

A. No Final Judgment or Decree Has Been Rendered for Purposes of Section 1257(a), and No Recognized Exception to the Finality Rule Applies.

Petitioners concede the California Supreme Court's decision below is not final for purposes of section 1257(a). They assert, however, this Court has jurisdiction over one narrow portion of the California ruling—its interpretation of California Corporations Code section 9142—under the fourth category of exceptions to the finality rule set forth in *Cox Broadcasting Corp.*, 420 U.S. at 482-83. Pet. 3. The Petition, however, fails to fully describe the fourth category of exceptions. This Court's complete description of the proffered exception follows, with the portion omitted by petitioners in italics.

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, *and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state*

> *proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.*

Cox Broadcasting Corp., 420 U.S. at 482-83 (emphasis added). Clearly, this exception to the finality rule does not apply.

At the outset, it is not clear the California Supreme Court's interpretation and application of California Corporations Code section 9142 is "final" for purposes of section 1257(a). Over respondents' protests, the parties continue to litigate this matter in the California Superior Court. On July 10, 2009, the trial court ruled petitioners are entitled to pursue their affirmative defenses and a cross-complaint.[3] In so doing, the trial court accepted petitioners' argument the California Supreme Court decided nothing more than California's "anti-SLAPP" statute does not apply. Petitioners contend in the trial court that section 9142 does not apply at all, and the Church and Diocese must still prove the Church is a

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[3] The Church and Diocese believe the trial court erred and they are entitled to judgment in their favor based on the California Supreme Court's decision. In response to the trial court's decision, they have filed a petition for writ of mandate in the California Court of Appeal seeking final judgment. The petition remains pending as of the date this Brief in Opposition was filed.

"superior religious body" for purposes of the statute. Petitioners' post-remittitur arguments, and the trial court's subsequent ruling, directly contradict petitioners' finality argument for purposes of jurisdiction in this Court.

Moreover, petitioners make no attempt to meet *Cox Broadcasting Corp.*'s prerequisites that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" and that allowing the decision to stand without immediate review could "seriously erode federal policy." *Cox Broadcasting Corp.*, 420 U.S. at 482-83.

First, if the Court were to find section 9142 unconstitutional, this would not preclude further litigation because the California Supreme Court's ruling rested on neutral principles wholly apart from the statute. Pet. App. 27a-28a ("Thus, the high court's discussion in *Jones v. Wolf* . . . , together with the Episcopal Church's adoption of Canon I.7.4 in response, strongly supports the conclusion that, once defendants left the general church, the property reverted to the general church.").

Second, denying immediate review of the state court decision would not "seriously erode federal policy." *Cox Broadcasting Corp.*, 420 U.S. at 483. The federal government has no "policy" concerning the manner in which religious denominations or their congregations hold or control property—nor could it. Furthermore, the result reached below, under both neutral principles approved by this Court and independently under section 9142, is entirely consistent

with decisions rendered over the past three decades by the highest courts in Nevada (1980), New Jersey (1980), Colorado (1986), Connecticut (1993), Pennsylvania (2005), and New York (2008), as well as California. *See infra* Part III.A. Given the thirty-year history of uniformity, this Court's declining immediate review of the decision could hardly erode any existing "policy." *See, e.g., Flynt v. Ohio*, 451 U.S. 619, 622 (1981) ("The resolution of this question can await final judgment without any adverse effect upon important federal interests."); *Johnson v. California*, 541 U.S. 428, 431 (2004). The Petition does not suggest otherwise.

Petitioners also ask the Court to "clarify *Jones v. Wolf* and provide the lower courts with further guidance on the significant constitutional questions implicated when the scope and nature of the hierarchy is itself a disputed question," and to review *Jones'* "inclusion of a denomination's constitution in the litany of sources of neutral principles of law . . . ." Pet. 25, 34. For purposes of the finality rule, these issues go well beyond the scope of whether section 9142 is unconstitutional, and instead relate directly to the analysis of this matter under "neutral principles of law"—an analysis which petitioners do not contend has been finally resolved in the state courts. The *Cox Broadcasting Corp.* exception simply does not apply to these issues.[4]

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[4] In any event, even if the Court were to accept petitioners' invitation to tinker with the evidentiary framework for church

(Continued on following page)

B. The Decision Below Is Adequately Supported By Independent State Grounds.

As this Court has explained, its "power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion[.]" *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Thus, a petition for certiorari will not be granted if "the same judgment would be rendered by the state court after we corrected its views of federal laws." *Id.* In this case, adequate and independent grounds support the California Supreme Court's opinion reversing the trial court's dismissal of the Church's and Diocese's complaints.

1. Apart from section 9142, the opinion is independently supported by the California Supreme Court's neutral principles analysis.

As noted above, the California Supreme Court adopted the neutral principles of law approach

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property disputes established in *Jones*, a reversal of the California Supreme Court's decision would not preclude further litigation. As in *Jones*, any articulation of a new constitutional framework would require remand for further proceedings. The Petition does not suggest otherwise and thus fails to satisfy any recognized exception to the finality rule. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 658-59 (2003); *Florida v. Thomas*, 532 U.S. 774, 780 (2001). In fact, the Petition recognizes a new framework would require evidentiary questions to be "tested in the crucible of litigation under . . . state law." Pet. 34.

approved by this Court in *Jones v. Wolf* as the method of analysis for resolving church property disputes in California. Pet. App. 23a-24a. The court examined the facts of this case under that approach and concluded, "St. James Parish agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments." Pet. App. 30a. The court noted the Church's Canon I.7.4 expressly states local church property is "held in trust" for the Church and the Diocese, and further that "earlier-enacted canons [also] impose substantial limitations on the local parish's use of church property and give the higher church authorities substantial authority over that property." Pet. App. 28a. Taken together, these "instruments make clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church." Pet. App. 30a.

The court's opinion makes clear these facts alone support its conclusion under the neutral principles analysis, concluding:

> In short, St. James Parish agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments. Those instruments make clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church. Respect for the First Amendment free

> exercise rights of persons to enter into a religious association of their choice, as delineated in *Jones v. Wolf, supra,* 443 U.S. 595 (as well as the provisions of section 9142) requires civil courts to give effect to the provisions and agreements of that religious association.

Pet. App. 30a-31a. "This conclusion," the court further explained, "is bolstered by a review of out-of-state cases that involved similar church property disputes within the Episcopal Church." Pet. App. 31a. Although none of the cited cases involved a state statute similar to section 9142, they nevertheless, "with near unanimity, awarded the disputed property to the general church."[5] *Id.*

To be sure, the court held its conclusion also was supported by section 9142. Pet. App. 28a. It is beyond doubt, however, the court would have reached the same conclusion even in the absence of the statute. *See* Pet. App. 30a-31a; *see also* Pet. App. 147a ("To the degree that section 9142 alters the common law rule enunciated by [then-current California Supreme Court

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[5] The one exception the court recognized, *Bjorkman v. Protestant Episcopal Church*, 759 S.W.2d 583 (Ky. 1988), arose before the Church's trust canon was adopted, "did not mention [that Canon], and . . . has not been followed by other jurisdictions." Pet. App. 32a-33a. Consistent with the California Supreme Court's observations, every appellate decision addressing a dispute within the Church after adoption of Canon I.7.4 has enforced the Canon in favor of the general church. *See infra* Part III.A.

precedent], that alteration *duplicates* the result required under the common law given the facts of this case.") (original emphasis). The court's determination is adequately supported on an independent state ground that petitioners concede is not yet ripe for review.

2. The judgment is independently supported by the court's interpretation of California's "anti-SLAPP" statute.

Review by the California Supreme Court occurred within the framework of a state procedural statute—the "anti-SLAPP" statute, California Civil Procedure Code section 425.16. Pet. App. 8a. In ruling on an anti-SLAPP motion under section 425.16, a California court decides first whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). "If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.* "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten*, 29 Cal. 4th 82, 89 (2002). The court must deny an anti-SLAPP motion if it fails on either prong.

Here, the California Supreme Court affirmed the intermediate appellate court's conclusion the anti-SLAPP statute does not apply because petitioners failed to satisfy the first prong of the statute. Pet. App. 9a-10a. In other words, petitioners did not prove the complaint arose from activity protected by section 425.16. *Id.* The court's affirmance of the intermediate appellate court's reversal of the judgment rests upon an independent state ground that is adequate to support its decision. *See Herb*, 324 U.S. at 125-26.

On remand to the trial court, petitioners not only acknowledged their failure to satisfy the first prong of section 425.16 constituted an independent basis for the California Supreme Court's decision, they argued the court's decision was based *solely* on section 425.16 because "this was all [it] could do on appeal from the grant of a preliminary motion." In its July 10, 2009 order, the trial court agreed, ruling "[i]t was the anti-SLAPP motion alone that provided the mechanism by which the case was appealed."

The California Supreme Court's interpretation of a state procedural statute constitutes an independent state ground adequate to support its decision, and its interpretation is not subject to review by this Court.[6]

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[6] The Church's complaint-in-intervention was dismissed after a demurrer was sustained. An appellate ruling reversing judgment based on a demurrer is not a final ruling for purposes of section 1257(a). *Miss. & Kan. Interurban Ry. Co. v. City of Olathe*, 222 U.S. 185, 186 (1911). Moreover, there is no part of the California Supreme Court's opinion that applies solely to the

(Continued on following page)

II. THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF SECTION 9142 DOES NOT RAISE ANY UNRESOLVED CONSTITUTIONAL ISSUES.

A. *Jones v. Wolf* Recognized the Enforceability of Denominational Trust Provisions.

In *Jones v. Wolf*, the Court was called upon to decide whether Georgia's specific approach to resolving church property disputes, which Georgia courts called the "neutral principles approach," was constitutional. Under that approach, courts looked to deeds, local church articles and bylaws, the constitution and rules of the denomination, and relevant state statutes to determine whether any of those sources demonstrated the property at issue was held for the denomination. *See Jones*, 443 U.S. at 599-601 (describing Georgia's approach in detail). If courts found a provision in any of those sources restricting local church property for use by a denomination and conferring a right to the property on the broader

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Church and not to the Diocesan plaintiffs as well, and the court's decision in the Diocese's favor alone fully reinstates all of the substantive claims in the case. The decision permits the Diocesan plaintiffs to seek a final judgment from the trial court concerning the use and control of the disputed property, including the same declaration sought by the Church—that the property held by St. James is held in trust for the Church and Diocese. The California Supreme Court's decision is fully and adequately supported by its interpretation of the anti-SLAPP statute.

church, they enforced it. *See, e.g.*, *Carnes v. Smith*, 222 S.E.2d 322 (Ga. 1976) (cited and discussed in *Jones*, 443 U.S. at 600-01, and enforcing express trust provision in Methodist Church's Book of Order). Where they found no such restriction in any of the sources identified, as in *Jones* itself, they ruled in favor of the local church. *Jones,* 443 U.S. at 608-09. This Court in *Jones* approved that specific method of analyzing church property disputes.

The Court reaffirmed the First Amendment "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization," and held that the "neutral principles" approach under review was "consistent with the foregoing constitutional principles." *Jones*, 443 U.S. at 602. The neutral principles analysis was "flexible enough to accommodate all forms of religious organization and polity" because it offered "flexibility in ordering private rights and obligations to reflect the intentions of the parties." *Id.* at 603. It allowed religious societies to "specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership [of property] in the event of a schism or doctrinal controversy" through "reversionary clauses and trust provisions." *Id.*

Jones explained the neutral principles approach "cannot be said to 'inhibit' the free exercise of religion" because the general church can take steps, "[a]t any time before the dispute erupts," to ensure "that the faction loyal to the hierarchical church will

retain the church property." *Jones,* 443 U.S. at 606. One such step, specifically endorsed in *Jones*, is that "*the constitution of the general church can be made to recite an express trust in favor of the denominational church.*" *Id.* (emphasis added). *Jones* did not dictate that any particular method must be used to amend the general church's governing documents. As the California Supreme Court observed, "[r]equiring a particular method to change a church's constitution . . . *would* infringe on the free exercise rights of religious associations to govern themselves as they see fit." Pet. 27a (original emphasis).

Jones further clarified that "*any rule of majority representation can always be overcome,* under the neutral principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or *by providing that the church property is held in trust for the general church and those who remain loyal to it.*" *Jones,* 443 U.S. at 607-08 (emphasis added). "In this manner a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members." *Id.* at 603-04.

At the very least, then, this Court made clear that states may constitutionally recognize and enforce

denominational trust provisions, as California has done.[7]

B. The Court Did Not Adopt an Unconstitutional Interpretation of Corporations Code Section 9142.

California Corporations Code section 9142 is fully consistent with *Jones'* explicit guidance. The statute provides:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at

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[7] For the past 30 years, religious denominations throughout the country have relied upon *Jones'* pronouncements in this regard. As petitioners acknowledge, "many mainline Protestant churches" have since adopted canons to explicitly confirm or establish the denomination's trust interest in local church property. Pet. 19; *see, e.g., Cumberland Presbytery v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992) ("[T]he Cumberland Presbyterian denomination followed to a T the suggestion of the U.S. Supreme Court in *Wolf* as to a method of insuring 'that the faction loyal to the hierarchical church will retain the church property.'"); *Korean United Presbyterian Church v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 512 (Ct. App. 1991) ("[T]he United States Supreme Court in *Jones*, invited the very type of provision now found in the Book of Order."). State courts have applied the neutral principles test endorsed in *Jones* and enforced those provisions. *See infra* Part III.A. If the Court were to accept petitioners' suggestion to recede from the clear guidance provided in *Jones*, chaos would result, not only for The Episcopal Church, but for numerous religious denominations that have structured their governing rules in reliance upon *Jones* over the past three decades.

> common law unless *one* of the following applies: [¶] . . .
>
> (2) Unless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.* [¶] . . .
>
> (d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments *creating the trusts*. . . .

(Emphasis added.)

As the California Supreme Court ruled, section 9142 "appears to be the type of statute the United States Supreme Court had in mind when it approved reliance on 'provisions of state statutory law governing the holding of property by religious corporations . . . .' (*Md. & Va. Churches v. Sharpsburg Ch.*, *supra*, 396 U.S. at p. 367, fn. omitted.)." Pet. App. 29a. In addition, like *Jones*, section 9142 by its plain terms provides that denominational trust provisions may be enforced. The California Supreme Court held Canon I.7.4 creates the type of express trust contemplated by section 9142, and the statute therefore "also compels the conclusion that the general church owns the property now that defendants have left the general church." Pet. App. 30a.

Petitioners argue the California Supreme Court adopted an unconstitutional interpretation of section 9142, in two respects. First, they assert the

interpretation impermissibly requires courts to determine, "as a threshold inquiry under Section 9142(c), whether one religious body is 'superior' to another, or whether a church is 'general' or not." Pet. 17. Petitioners state this analysis requires courts to resolve property disputes based on core religious doctrine and practice. Pet. 22-23. Second, they allege the court's interpretation of section 9142 gives general church associations the ability to unilaterally create trusts for themselves, thus favoring certain kinds of religious organizations over secular associations and other types of religious organizations. Pet. 12, 14. Neither point has merit.

1. The California Supreme Court did not decide any questions of religious doctrine or polity.

The court did not decide any questions about the structure of the Church or its religious doctrine. It merely concluded, based on St. James' own express written promises confirming the Church's Constitutions and Canons would "'forever'" form part of the Parish's governing documents, that the Parish is bound by the Church's rules. Pet. App. 4a, 30a. Whether the Church and Diocese are superior to the Parish from a theological perspective was irrelevant to the court's analysis of these documents, and its interpretation of written instruments does not raise constitutional issues.

In any event, the supposed difficulty of characterizing the governing structure of different religious

organizations is purely hypothetical as it pertains here—The Episcopal Church is undisputedly hierarchical, as that term has been defined and applied by civil courts.[8] Numerous courts have so held, and there are no decisions to the contrary. *See, e.g.*, *Dixon v. Edwards*, 172 F. Supp. 2d 702, 715 (D. Md. 2001) ("Courts have repeatedly and invariably recognized that the [Episcopal] Church is hierarchical. Indeed, there appears to be no case to the contrary and Defendants have noted none."), *aff'd in part and remanded in part on other grounds*, 290 F.3d 699 (4th Cir. 2002).[9]

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[8] The term "hierarchical" easily accommodates a range of church polities, including many that have various democratic or representational elements or delegate some decision-making authority to local church bodies. The only real question is whether the local church is subject to some higher authority that has taken action on the subject at hand. This is a determination civil courts are well equipped to make, and routinely do in the context of secular associations. *See, e.g.*, *United States v. Int'l Bhd. of Teamsters*, 968 F.2d 1506, 1511 (2d Cir. 1992) (distinguishing between affiliates "whose authority is derived from their hierarchical association with the international union" and other locals which are "independent entities").

[9] For a sampling of the numerous decisions uniformly holding the Church is hierarchical, *see, e.g.*, *Petrell v. Shaw*, 902 N.E.2d 401, 403 (Mass. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 921 (N.Y. 2008); *New v. Kroeger*, 167 Cal. App. 4th 800, 808 (Ct. App. 2008); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 921 (Mass. App. Ct. 2003); *Daniel v. Wray*, 580 S.E.2d 711, 714 (N.C. Ct. App. 2003); *Trustees of the Diocese of Albany v. Trinity Episcopal Church*, 684 N.Y.S.2d 76, 78 (N.Y. App. Div. 1999); *Parish of the Advent v.*

(Continued on following page)

Given the absolute uniformity of these decisions, there is no legitimate dispute, and certainly no conflict among state courts, regarding the hierarchical nature of the Church.

2. Section 9142 does not award an unconstitutional preference to hierarchical religious organizations.

Petitioners contend the approach adopted by the California Supreme Court is unconstitutional in that it grants special benefits to hierarchical churches that secular associations and other forms of religious organizations do not enjoy. Pet. 13-14, 17-18. The premise of this contention is simply incorrect. Enforcement of the Church's trust interest is consistent with how California courts treat *all* similarly situated associations, both secular and religious, and application of those rules here comports with the neutral principles doctrine.

Protestant Episcopal Diocese of Mass., 688 N.E.2d 923, 931 (Mass. 1997); *Moses v. Diocese of Colo.*, 863 P.2d 310, 325 (Colo. 1993); *Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285 (Conn. 1993); *Bennison v. Sharp*, 329 N.W.2d 466, 473 (Mich. App. Ct. 1982); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Tea v. The Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 183 (Nev. 1980).

a. Enforcement of Church Canons under section 9142 is consistent with how California courts treat all voluntary associations, secular and religious.

Under California state law, the constitution and rules of a private secular voluntary association constitute a contract between the association and its members, and the law assumes members have voluntarily submitted themselves to the terms of that contract. *Cal. Dental Ass'n v. American Dental Ass'n*, 23 Cal. 3d 346, 353 (1979) ("'[T]he rights and duties of the members as between themselves and in their relation to [a private voluntary] association, in all matters affecting its internal government and the management of its affairs, are measured by the terms of [its] constitution and by-laws'"). California law applicable to secular voluntary associations also holds an organization's rules are binding on all members regardless of when they were enacted. *See, e.g.*, *Gear v. Webster*, 258 Cal. App. 2d 57, 61-62 (Ct. App. 1968) ("'This relation [between a voluntary association and its members] is to be determined, however, by a consideration of the entire body of the rules governing the association, and is not limited to those existing at the time the individual became a member. Unless the rules at that time placed a limitation upon the power of the association to make any change or amendment therein, any amendment or change adopted in accordance with the mode provided by the association therefor is binding upon each of the members.'").

Accordingly, California courts have enforced a superior organization's dictates regarding property held by subordinate chapters or members under circumstances similar to this case.

> When a schism has occurred in a . . . benevolent association, which has united with and assented to the control and supervision of a general organization, and acquired property since its union and assent to the government of the general organization, . . . the title to the property remains in the name of the association, and that faction which has remained loyal and adhered to the laws, usages, and customs of the general organization constitutes the true association, and is alone entitled to the use and enjoyment of the association's property. This rule applies whether the subordinate association be a corporation or simply a voluntary association, and regardless of whether the majority or minority of the entire membership constitute the faction adhering to and observing the laws, usages, and customs of the general organization . . . .

Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9, 118 Cal. App. 2d 78, 85 (Ct. App. 1953); *see also Thatcher v. City Terrace Cultural Ctr.*, 181 Cal. App. 2d 433, 453 (Ct. App. 1960) ("'Local lodges come into being, not as independent organizations existing solely for the benefit of their members, but as constituents of the larger organization, the grand lodge, organized for specific purposes, most of which can be accomplished only through subordinate

bodies, the local lodges. . . . The property so acquired by the local lodge becomes impressed with the group purpose of a fraternal benefit society.'").

Nor does the court's interpretation of section 9142 prefer hierarchical over congregational churches—it affords equal treatment to each form of church organization by respecting the governing structure adopted by its members, and by giving due consideration to the governing rules adopted by the appropriate authority within that structure.

Enforcing a general church's trust provision against that church's members and constituent entities under section 9142 is consistent with long-standing California law applicable to all private voluntary associations, secular or religious.

b. Enforcement of Church Canons under section 9142 is consistent with generally applicable California state law concerning charitable trusts.

Petitioners assert the California Supreme Court's interpretation of section 9142 is unconstitutional because it exempts hierarchical denominations from general principles of state trust law. Pet. 26-27. The statute, however, is consistent with California state law governing charitable trusts.

"[A]ssets of charitable corporations are deemed to be impressed with a charitable trust by virtue of the

declaration of corporate purposes," and may not be diverted to other uses, charitable or otherwise. *Am. Ctr. for Ed., Inc. v. Cavnar*, 80 Cal. App. 3d 476, 486 (Ct. App. 1978); *see also Brown v. Mem. Nat'l Home Found.*, 162 Cal. App. 2d 513, 521 (Ct. App. 1958) ("[A]ll the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes . . . . In other words, the acceptance of such assets under these circumstances establishes a charitable trust for the declared corporate purposes as effectively as though the assets had been accepted from a donor who had expressly provided in the instrument evidencing the gift that it was to be held in trust solely for such charitable purposes") (quoting *Pac. Home v. County of Los Angeles*, 41 Cal. 2d 844, 852 (1953)). It is not necessary that the charitable organization agree in writing to hold its assets in trust—accepting the donated property establishes this duty as a matter of law. *Id.*; *see also* Cal. Bus. & Prof. Code § 17510.8 (West 2008).

St. James' Articles of Incorporation state the Parish was formed for the explicit purpose, "To establish and maintain a Parish which shall form a constituent part of the Diocese of Los Angeles in the branch of the Holy Catholic Church now known as the Protestant Episcopal Church in the United States of America," forever held under the "Ecclesiastical authority of the

Bishop of Los Angeles" in conformity with the Constitutions and Canons of the Episcopal Church. Generations of faithful Episcopalians donated money to St. James based on this expressed purpose—that of being an Episcopal parish. California law on charitable trusts provides that St. James' property cannot be diverted from this declared purpose.[10] Again, section 9142 is consistent with California trust law applicable to similarly situated charitable trusts.

III. THERE IS NO CONFLICT AMONG STATE COURTS THAT SUPPORTS REVIEW IN THIS CASE.

Petitioners contend the Court must clarify its holding in *Jones* because state courts have not applied that decision consistently. Again, this argument does not support review in this case. There is no conflict among state courts of last resort concerning the constitutionality of California Corporations Code section 9142 or any similar state statute, and

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[10] Some *amici* posit that church members mean for their donations to support only the local church, not the larger denomination. As the California Supreme Court observed in response to the same argument,

> [t]he only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.

Pet. App. 37a.

petitioners point to none. As this is the only allegedly "final" portion of the opinion supporting jurisdiction in this Court, there is no need for review. Nor, as shown below, is there any conflict among state courts that would theoretically support review of any other issue addressed in the California court's opinion.

A. There Is No Split Among State Courts Regarding Enforcement of the Episcopal Church's Trust Interest in Parish Property.

Every state court of last resort addressing the issue has enforced the Church's express trust interest in parish property in accordance with the constitutional framework established in *Jones*. *See Episcopal Diocese of Rochester*, 899 N.E.2d 920; *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); *Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc.*, 620 A.2d 1280; *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85 (Colo. 1986); *Protestant Episcopal Church in Diocese of N.J.*, 417 A.2d 19; *Tea*, 610 P.2d 182.[11]

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[11] In addition, every intermediate state appellate court to consider the Church's express trust Canon has similarly enforced the Canon, and the Church's trust interest in parish property, in accordance with the guidelines established in *Jones*. *See, e.g., Episcopal Diocese of Mass.*, 797 N.E.2d 916; *Daniel*, 580 S.E.2d 711; *Bennison*, 329 N.W.2d 466.

This unbroken line of cases enforcing the Church's trust interest in parish property, spread over the last three decades, negates any notion there is a division among state courts that merits review or that any additional guidance from this Court is required on these facts.[12]

B. State Courts Agree the Neutral Principles Approach Approved in *Jones v. Wolf* Is a Permissible Method of Analysis, and General Church Rules Should Be Considered Under That Analysis.

1. There is no dispute that "neutral principles" are constitutionally permissible.

In *Jones*, this Court held that, subject to certain First Amendment limitations, states may utilize different methods for analyzing and resolving church property disputes. "[T]he First Amendment does not dictate that a State must follow a particular method of resolving church property disputes." *Jones*, 443

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[12] Petitioners cite *Bjorkman*, 759 S.W.2d 583, where the court declined to find a trust interest in favor of the denomination when the disaffiliation occurred prior to the denomination's adoption of an express trust provision. As the Kentucky Supreme Court explained in a subsequent decision, "in *Bjorkman* we had no general church constitutional pronouncement adopted before the dispute erupted, mandating expressly that all property was to be held in favor of the denominational church." *Cumberland Presbytery*, 824 S.W.2d at 422.

U.S. at 602. As noted above, this Court then held the particular neutral principles analysis developed in Georgia, and now adopted by the California Supreme Court, was constitutional. Although petitioners assert there is a dispute among state courts concerning whether the *Watson v. Jones* "deference" approach is constitutionally compelled, this Court should not grant certiorari simply to restate the precise point already made in *Jones v. Wolf*. Nor would the existence of such a dispute warrant review of the decision here, where the court plainly understood and correctly held the neutral principles analysis was a constitutionally acceptable option. In any event, there is no dispute among state courts.[13]

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[13] Petitioners erroneously assert West Virginia and New Jersey hold a hierarchical deference approach is "constitutionally compelled." Pet. 30 (citing *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W. Va. 1984) and *Protestant Episcopal Church in Diocese of N.J.*, 417 A.2d at 24). In fact, the West Virginia Supreme Court made clear its understanding that "another form of judicial review which meets constitutional considerations is the more scrutinizing 'neutral principles of law' test approved by the United States Supreme Court for property disputes." *Original Glorious Church of God in Christ, Inc. v. Myers*, 367 S.E.2d 30, 34 (W. Va. 1988). Similarly, the New Jersey Supreme Court explicitly recognized the neutral principles of law approach is "another acceptable method of resolving church property disputes." *Protestant Episcopal Church in Diocese of N.J.*, 417 A.2d at 23.

2. There is no dispute general church rules should be considered under "neutral principles."

In another attempt to create the appearance of conflict, petitioners allege the New Hampshire Supreme Court adopted an approach which does not permit any consideration of church constitutions or canons. Pet. 35. But, again, petitioners are incorrect. There are *no* cases holding, as petitioners would have this Court decide, that a denomination's governing documents should not be reviewed or enforced in a property dispute like the one at bar.

In *Berthiaume v. McCormack*, 891 A.2d 539 (N.H. 2006), the court considered a case brought by a few individual members of the Roman Catholic Church, who sought to reverse their bishop's decision to consolidate three existing parishes and sell the parish church in which the plaintiffs had previously worshipped. *Id.* at 541-43. The property at issue was titled in the name of the Catholic diocese. *Id.* at 548. Plaintiffs argued the bishop had a duty rooted in the Canons to preserve the parish church building for them. *Id.* The bishop, on the other hand, argued that to consolidate the three parishes and sell off the excess property was within his canonical and ecclesiastical authority. *Id.* at 543-44.

The New Hampshire Supreme Court affirmed the lower court's decision in favor of the bishop, explaining the deed vesting title in "Dennis M. Bradley, Bishop of Manchester" in combination with a New

Hampshire statute specifying that deeds to "Dennis M. Bradley, Bishop of Manchester" were to be interpreted as vesting property in "the Roman Catholic Bishop of Manchester," conclusively resolved the dispute before it. *Berthiaume*, 891 A.2d at 548, 550-51. There was no need to review or seek to define the extent of the bishop's canonical authority in the absence of any clearly worded canon specifically addressing that situation, and the court declined to do so. *Id.* Nor did the court address the issue of whether clearly expressed denominational rules restricting the use and control of local church property could or should be ignored.

C. The Alleged Conflict Between the Appellate Courts of California and Arkansas Is Easily Reconciled.

Petitioners further suggest there is a split of authority between this case and a recent Arkansas case. Pet. 25-26. Petitioners overlook the reality that the neutral principles analysis by its nature is a fact-specific inquiry. For that reason, it is hardly surprising that courts applying the analysis to different records involving different denominations might reach different conclusions as to which side should prevail in any given case.

Indeed, the Arkansas and California cases are easily reconciled. The Arkansas Supreme Court explicitly stated it did not consider the denomination's post-*Jones* adoption of an express trust provision

because counsel for the denomination had failed to raise the argument in the lower courts. *Ark. Annual Conference of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 436 n.1 (2009), *petition for cert. filed*, 77 U.S.L.W. 3634 (Apr. 30, 2009) (No. 08-1352) ("At oral argument, counsel for AME stated . . . the *Book of Discipline* was later amended to include [an express trust] provision. . . . [C]ounsel conceded that AME did not make this argument before the circuit court."). In addition, the court emphasized that "[n]o testimony or documents were introduced by any party regarding the formation of [the local church] or its initial connection with the [denomination]," and the evidence showed the local church "did not associate exclusively or even primarily with other [denominational] churches." *Id.* at 432.

In contrast, the California Supreme Court's decision rested upon the following facts, absent in the Arkansas case—"St. James Parish agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments." Pet. App. 30a.

Nor is there a conflict among state courts on which version of a general church's rules should be considered in the application of neutral principles—those in force when the local church was formed, or those in effect at the time of the dispute. *See* Pet. 27. The answer may vary depending upon the facts of each case and evidence in the record, and likely cannot be uniformly resolved by this Court as a

matter of federal or constitutional law. As noted above, it appears the parties in the Arkansas case presented only an older version of that denomination's rules, and the denomination failed to argue to the trial court that it should prevail based upon the rules in effect at the time of the conflict. *Ark. Annual Conference*, 375 Ark. at 436 n.1.

In any event, this case does not present an appropriate vehicle for addressing or resolving this timing issue. Every appellate decision has held that Canon I.7.4 did not create a new rule regarding property ownership, but merely restated and confirmed the Church's pre-existing policy. *See, e.g., In re Church of St. James the Less,* 888 A.2d at 810; *Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc.*, 620 A.2d at 1292; *Bishop & Diocese of Colo.*, 716 P.2d at 105 n.15; *Protestant Episcopal Church in Diocese of N.J.*, 417 A.2d at 24; *Trustees of the Diocese of Albany,* 684 N.Y.S.2d at 81; *see also* Pet. App. 28a, 32a (noting that a strong argument exists that Canon I.7.4 restated existing policy and citing numerous cases so holding).

Thus, whether this Court were to consider Canon I.7.4 or those Canons predating the acquisition of the local church property at issue here, the result would be the same. In addition, the California Supreme Court noted St. James had amended its Articles in 1991, well after enactment of Canon I.7.4, incorporating all the Canons of the Church. Pet. App. 5a. In California, members of voluntary associations are generally bound by organizational rules as they are

amended over time. *See supra* Part II.B.2(a). This, too, would justify application of Canon I.7.4 to St. James, even if the Canon were deemed a "new rule" adopted in 1979.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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No. 08-1579

IN THE

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

JOINT SUPPLEMENTAL BRIEF OF PETITIONERS AND SELECT RESPONDENTS* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Select Respondents Joining this Supplemental Brief:

The Rector, Wardens and Vestrymen of All Saints' Parish in Long Beach, California, a California Nonprofit Religious Corporation; The Rev. William A. Thompson; The Rev. Ronald K. White; David Thornburg; Jenna Iovine; Paul Croshaw; Bill Davidson; Vondi Forrester; John Hall; Gail Hauck; Peter Jordan; Dan Kamikubo; Jeff Lang; Jo Smith; Sara Willien; and Hon. Fred Woods [All Saints' Respondents].

The Rector, Wardens and Vestrymen of St. David's Parish in North Hollywood, California, a California Nonprofit Religious Corporation; The Rev. Jose Poch; Dianne Charves; Deborah Chase; William Coburn; Primi Esparza; Laurie Leney; Wendy Leroy; Megan Mcallister; Alwayne Palmer; Janet Palmer; Benson Usiade; and Chris Woodrum [St. David's Respondents].

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, Petitioners and Select Respondents file this supplemental brief in support of the Petition for Writ of Certiorari, to call the Court's attention to *All Saints Parish Waccamaw, et al. v. The Protestant Episcopal Church in the Diocese of South Carolina, et al.*, No. 29724 (S.C., September 18, 2009) (available at http://www.sccourts.org/opinions/displayOpinion.cfm?caseNo=29724),[1] decided by the Supreme Court of South Carolina on Friday, September 18, 2009. The case deepens the state court split identified in the Petition for Writ of Certiorari; involves the identical denomination at issue in the case *sub judice*; applies the same neutral principles of law approach purportedly adopted by the California Supreme Court in its decision below, but reaches the opposite conclusion; and rejects a principal contention regarding the legal effect of Canons of the Episcopal Church made by Respondents The Episcopal Church and The Protestant Episcopal Church in the Diocese of Los Angeles in their Brief in Opposition, further demonstrating that certiorari is warranted in this case.

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[1] The full opinion is reprinted as a Supplemental Appendix to this Brief, beginning at Supp. App. 1a.

ARGUMENT

I. The Decision of the South Carolina Supreme Court Deepens the State Court Split Identified in the Petition.

The decision of the South Carolina Supreme Court in *All Saints Parish Waccamaw* deepens or makes more explicit several aspects of the state court split identified in the Petition. All lend additional support to Petitioners' claim that certiorari is warranted. The fact that the South Carolina case involves the Episcopal Church—the very same denomination at issue in the California decision under consideration here, makes the conflict between the two decisions all the more significant.

A. The South Carolina Court held that a neutral principles of law approach is required by the First Amendment.

The South Carolina Court explicitly held that a neutral principles of law approach is *required* whenever a church property dispute can be resolved according to those neutral principles. Although the South Carolina Court recognized that this Court has allowed both hierarchical deference and neutral principles of law approaches to resolving church property disputes, it expressly held "that where a civil court can completely resolve a church dispute on neutral principles of law, *the First Amendment commands it to do so*." *All Saints Parish Waccamaw*, at Supp. App. 20a (emphasis added) (citing *Pearson v. Church of God*, 478 S.E.2d 849 (1996)).

The holding that the First Amendment "*commands*" the use of a neutral principles approach puts

the South Carolina Supreme Court in agreement with the decisions noted in our Petition from the Supreme Courts of Louisiana and Alabama and an intermediate appellate court from Illinois. Petition at 28 (citing *Fluker Cmty. Church v. Hitchens*, 419 So.2d 445, 447 (La. 1982); *Trinity Presbyterian Church of Montgomery v. Tankersley*, 374 So.2d 861, 866 (Ala.1979); *York v. First Presbyterian Church of Anna*, 474 N.E.2d 716, 719 (Ill. App. Ct. 1984)). It also puts South Carolina at odds with the decision of the California Supreme Court below, which purported to apply a neutral principles approach but in actuality deferred to hierarchical claims and canons of the denomination, as well as the decisions from New Jersey and West Virginia holding, respectively, that a neutral principles approach is permitted "[o]nly where no hierarchical control is involved" and that the First Amendment "dictates" a hierarchical deference approach once a church is determined to be hierarchical. *See* Petition at 30 (citing *Protestant Episcopal Church in Diocese of New Jersey* v. *Graves*, 417 A.2d 19, 24 (N.J. 1980); *Church of God of Madison* v. *Noel*, 318 S.E.2d 920, 923 (W. Va. 1984)). Contrasted with property disputes that can be resolved by neutral principles of law, the South Carolina Court reserved the hierarchical deference approach to "decision[s] of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration," and "where a civil court is presented an issue which is a question of religious law or doctrine masquerading as a dispute over church property or corporate control." In such cases, it noted, the courts "must defer to the decisions of the proper church judicatories in so far as

it concerns religious or doctrinal issues." *All Saints Parish Waccamaw*, at Supp. App. 20a (citing *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709 (1976)).

B. The South Carolina Court expressly rejected what the California Court below deemed a "strong argument" that the Episcopal Church's Dennis Canon merely restated pre-existing Church policy.

The Dennis Canon was purportedly adopted by The Episcopal Church in 1979 to claim a trust interest in the property of separately-incorporated local churches affiliated with the Episcopal Church, and Respondents have argued that the Canon merely restated long-standing Church policy. *See, e.g.*, BIO at 5-6. The South Carolina Supreme Court explicitly rejected that claim, holding that prior to the Dennis Canon, "[n]o such property canons existed." *All Saints Parish Waccamaw*, at Supp. App. 9a.

That puts the South Carolina decision in conflict with what Respondents described as "[e]very appellate decision" dealing with the Dennis Canon, which according to Respondents "ha[d] held that [the Canon] did not create a new rule regarding property ownership, but merely restated and confirmed the Church's pre-existing policy." BIO, at 39 (citing *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005); *Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc.* v. *Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993); *Bishop & Diocese of Colo.* v. *Mote*, 716 P.2d 85, 105 n.15 (Colo. 1986); *Graves*, 417 A.2d, at 24; *Trustees of the Diocese of Albany* v. *Trinity Episcopal Church of*

Glvoersville, 250 A.D.2d 282 (N.Y. S.Ct. App. Div. 1999)). The suggestion by the California Court below "that a strong argument exists that [the Dennis Canon] restated existing policy," Pet.App. 28a, 32a, has now been met with a powerful and persuasive holding to the contrary.

C. The South Carolina Court also held that the Dennis Canon itself was of no legal effect.

In applying neutral principles of law, the South Carolina Supreme Court also explicitly held that the Dennis Canon itself is of "no legal effect," because "[i]t is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another." Supp. App. 25a. That places South Carolina at odds with the California Court below, which disregarded traditional principles of trust law and granted special preference to a religious denomination – the putative beneficiary – to purportedly create a trust interest in property held by a separate but spiritually-affiliated religious corporation without the property owner's express consent.

The South Carolina Court also breaks what Respondents described as the "unbroken line of cases enforcing the [Episcopal] Church's trust interest in parish property." BIO, at 33-34 (citing *Episcopal Diocese of Rochester* v. *Harnish*, 899 N.E.2d 920 (N.Y. 2008); *In re Church of St. James the Less*, 888 A.2d 795 (Pa. 2005); *Rector, Wardens & Vestrymen of Trinity-Saint Michael's Parish, Inc.* v. *Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280 (Conn.

1993); *Bishop & Diocese of Colo.* v. *Mote*, 716 P.2d 85 (Colo. 1986); *Protestant Episcopal Church in Diocese of N.J.* v. *Graves*, 417 A.2d 19 (N.J. 1980); *Tea* v. *The Protestant Episcopal Church in Diocese of Nev.*, 610 P.2d 182 (Nev. 1980)).

As noted in the Petition, these conflicts reflect much more than the adoption of different policy choices by the state courts. They reflect a deep rift in the state courts' understanding of the neutral principles of law approach approved by this Court in *Jones* v. *Wolf*, 443 U.S. 595 (1979).

II. The South Carolina Supreme Court's Decision Is A Model Of Clarity, Applying The Neutral Principles Of Law Approach Approved By This Court In *Jones* v. *Wolf* In A Manner That Does Not Give Rise To The Constitutional Problems Generated By The Decision Of The California Supreme Court Below.

The recent decision of the South Carolina Supreme Court highlights how straightforward and simple the resolution of church property disputes can be under truly neutral principles of law, in stark contrast to the morass of religious doctrine and polity determinations that are implicated by the methodology followed by the California Supreme Court below, including having a court determine as a threshold inquiry whether and how a church is hierarchical before applying a church property rule of decision. By refusing to give credence to a church canon that, contrary to the most basic precepts of property and trust law, purported to allow a trust to be

created by the beneficiary of the trust without approval of the property owner, the South Carolina Court's decision certainly seems to be more in accord with what this Court had in mind in *Jones v. Wolf* when it noted that the neutral principles of law "method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." 443 U.S., at 603. At the very least, the radically different treatment afforded church canons under the South Carolina Court's application of neutral principles and that afforded by the California Supreme Court below demonstrates that further clarification by this Court about the weight to be given to church canons that conflict with basic precepts of property and trust law is warranted.

CONCLUSION

The recent decision of the Supreme Court of South Carolina, involving the same religious denomination and, purportedly, the same neutral principles of law approach to resolving church property disputes, stands in stark contrast to that of the California Supreme Court under review here. The petition for a writ of certiorari should be granted to resolve that conflict and to clarify how a local church can order its secular affairs so that, when confronted with a doctrinal dispute, the members of its congregation can continue to freely exercise their religion in the houses of worship they built.

Respectfully submitted,

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September 22, 2009

THE STATE OF SOUTH CAROLINA

In The Supreme Court

All Saints Parish Waccamaw, a South Carolina Non-profit Corporation; D. Clinch Heyward, Warden for All Saints Parish, Waccamaw; W. Russell Campbell, Warden for All Saints Parish, Waccamaw; Martha M. Lachicotte, Ann Usher Mercer, Vandell Arrington and Rives Kelly, Individually and as Representatives of the Inhabitants of the Waccamaw Neck Region of Georgetown County; and Evelyn Labruce, Individually and as a Descendant of George Pawley; Of Whom W. Russell Campbell in his capacity as Senior Warden of All Saints Church, is also a Defendant by way of Counterclaim, Plaintiffs,

Of Whom All Saints Parish Waccamaw, a South Carolina Non-profit Corporation; D. Clinch Heyward, Warden for All Saints Parish, Waccamaw; W. Russell Campbell, Warden for All Saints Parish, Waccamaw are, Respondents/Appellants,

v.

The Protestant Episcopal Church in the Diocese of South Carolina; The Episcopal Church, a/k/a The Protestant Episcopal Church in the United States of America; Mark Sanford, in his official capacity as the Governor of the State of South Carolina; and John and Jane Doe, as descendants to George Pawley and William Poole, Defendants,

Of Whom The Protestant Episcopal Church in the Diocese of South Carolina; The Episcopal Church,

a/k/a The Protestant Episcopal Church in the United States of America are, Appellants/Respondents,

and Mark Sanford, in his official capacity as The Governor of the State of South Carolina; and John and Jane Doe, as descendants to George Pawley and William Poole are, Respondents.

Guerry Green, on behalf of All Saints Parish, Waccamaw, and in his capacity as Senior Warden of the same; Carl Short, on behalf of all of All Saints Parish, Waccamaw, and in his capacity as Junior Warden of the same; and George Townsend, James Chapman, and Edward Mills, on behalf of All Saints Parish, Waccamaw, and in their capacities as Members of the Vestry of the same; The Protestant Episcopal Church in the Diocese of South Carolina and the Right Reverend Edward L. Salmon, Jr., in his capacity as Bishop of the Protestant Episcopal Church in the Diocese of South Carolina, Appellants/Respondents,

v.

W. Russell Campbell, in his capacity as Senior Warden of All Saints Church; D. Clinch Heyward, in his capacity as Junior Warden of All Saints Church; Donald Alford, Butler F. Dargan, Diane Deblock, Robert L. Jones, A.H. (Doc) Lachicotte, David Lane, Lou Paquette, Hugh Patrick and Daniel W. Stacy, in their capacity as Vestry Members of All Saints Church; David E. Grabeman, in his capacity as Treasurer of All Saints Church; All Saints Church, an unincorporated association; All Saints Church, Waccamaw, Inc., a South Carolina Non-profit Corpo-

ration; Henry McMaster, in his capacity as Attorney General for the State of South Carolina; Mark Hammond, in his capacity as Secretary of State for the State of South Carolina; and John and Jane Doe, as Unknown Descendants of George Pawley, Defendants,

Of Whom W. Russell Campbell, in his capacity as Senior Warden of All Saints Church; D. Clinch Heyward, in his capacity as Junior Warden of All Saints Church; Donald Alford, Butler F. Dargan, Diane Deblock, Robert L. Jones, A.H. (Doc) Lachicotte, David Lane, Lou Paquette, Hugh Patrick and Daniel W. Stacy, in their capacity as Vestry Members of All Saints Church; David E. Grabeman, in his capacity as Treasurer of All Saints Church; All Saints Church, an unincorporated association; All Saints Church, Waccamaw, Inc., a South Carolina Non-profit Corporation are, Respondents/Appellants,

and Henry McMaster, in his capacity as Attorney General for the State of South Carolina; Mark Hammond, in his capacity as Secretary of State for the State of South Carolina; and John and Jane Doe, as Unknown Descendants of George Pawley are, Respondents.

In Re: All Saints Parish, Waccamaw, a South Carolina Non-profit Religious Corporation.

Appeal from Georgetown County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 29724
Heard March 5, 2009 – Filed September 18, 2009

REVERSED

Benjamin Allston Moore, Jr., Julius H. Hines, David S. Yandle, all of Buist, Moore, Smythe & McGee, and Coming B. Gibbs, Jr., of Gibbs & Holmes, all of Charleston; and David Booth Beers and Heather H. Anderson, both of Goodwin Procter, LLP, of Washington, for Appellant-Respondents.

Attorney General Henry Dargan McMaster, Assistant Attorney General C. Havird Jones, both of Columbia; and Fred B. Newby, of Newby, Sartip, Masel & Casper, of Myrtle Beach, for Respondents.

Henrietta U. Golding and Amanda A. Bailey, both of McNair Law Firm, of Myrtle Beach, for Respondent-Appellants.

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, all of Nelson, Mullins, Riley & Scarborough, of Columbia, and Lloyd J. Lunceford, of Baton Rouge, for Amicus Curiae.

CHIEF JUSTICE TOAL: This case presents two questions that arise out of a dispute over church property and corporate control: (1) whether the trial court correctly determined that a trust deed, executed in 1745 for the establishment of a Parish in

the Waccamaw Neck region of South Carolina,[1] remains valid; and (2) whether the trial court correctly determined that the vestry representing a minority group of the congregation were the officers of the congregation's corporate entity, All Saints Parish, Waccamaw, Inc.

FACTUAL/PROCEDURAL BACKGROUND

Underlying this appeal are two lawsuits that were consolidated for trial in Georgetown County. The first lawsuit ("the 2000 Action") was a declaratory judgment action filed by All Saints Parish, Waccamaw, Inc. against the Episcopal Church in the United States of America ("ECUSA") and the South Carolina Diocese ("Diocese"). The 2000 Action was precipitated by the Diocese's recording of a notice with the Georgetown County clerk of court by which it purported to put the public on notice that the congregation of All Saints Parish held its property in trust for the Diocese and ECUSA.

After the congregation fractured, the second lawsuit ("the 2005 Action") was filed by a minority faction of the original congregation against its majority which had voted to sever ties with the ECUSA and the Diocese. The minority faction remained loyal to the denominational authorities and was represented by a vestry led by Guerry Green ("the minority ve-

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[1] The Waccamaw Neck is a geographical area bounded by the Waccamaw River and Winyah Bay on the west and south, the Atlantic Ocean on the east, and the North Carolina line in the north.

stry"). The majority group was represented by a vestry led by W. Russell Campbell ("the majority vestry"). In the 2005 Action, the minority vestry sought a declaration that they, and not the majority vestry, were the officers of All Saints Parish, Waccamaw, Inc. The 2000 Action and the 2005 Action were consolidated and tried in March 2006. This appeal is from the trial court's order.

The facts relevant to this appeal date to the early eighteenth century. By the Church Act of 1706, the South Carolina Commons House of Assembly ("Commons House") established the Church of England as the official religion of colonial South Carolina and created the first parishes in the colony. Parishes were regionally defined and served as ecclesiastical and political entities. All Saints Parish, however, was not formed at that time.

In 1734, George Pawley, a member of the Commons House, was appointed by legislative enactment to erect church buildings in the St. John's and the Prince George Parishes. He was "authorized to accept and take any grant or conveyance of any lands within said parishes respectively, to them and their heirs, in trust, for the inhabitants of said parishes." Act No. 567 at § 6, 3 S.C. Stat. 374, 375 (1734). In 1745, Percival and Ann Pawley transferred approximately 60 acres to George Pawley and William Poole. The language of this trust deed ("the 1745 Trust Deed") provided that George Pawley and William Poole were deeded the land "forever in Trust For the Inhabitants On Waccamaw Neck for Use of A Chapel or Church for divine Worship of the Church of England established by Law...". Consid-

eration for this transfer was "the Sum of one hundred pounds current Money of South Carolina."[2] The terms of the 1745 Trust Deed did not bestow any duties upon the trustees, and there is no evidence to suggest that the trustees exercised any duties relative to the 1745 Trust Deed.

On December 10, 1766, the inhabitants of the Waccamaw Neck formally petitioned the Commons House requesting the establishment of their own parish. In 1767, an Act of the Commons House carved out a piece of the Prince George Parish, thus creating a new Parish named All Saints in the Waccamaw Neck region. Subsequently, on January 2, 1767, the 1745 Trust Deed was recorded in Charleston.[3] By 1774, both George Pawley and William Poole had died. Neither the 1745 Trust Deed nor the trustee's wills named a successor trustee. By all accounts, the property at issue has been actively used as a place of worship since at least 1767, if not before.

The relationship between South Carolina's colonial parishes and the Diocese of London was severed during the Revolutionary War. Nonetheless, the South Carolina General Assembly re-established All Saints Parish in 1778. Even though the Church of England was formally disestablished as the offi-

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[2] According to the "Average Earnings Index," one hundred (100) British Pounds in 1745 was worth One Hundred Forty-One Thousand, Eight Hundred Twenty-Five (141,825) British Pounds or Two Hundred Seventy-Seven Thousand, Seven Hundred and Seventy-Eight (277,778) U.S. Dollars in 2007.

[3] At the time, Charleston was the only place in South Carolina at which land instruments could be recorded.

cial religion of South Carolina in 1790, the property at issue continued to be used as a place of worship.

In 1820, the South Carolina General Assembly passed an Act which officially incorporated the wardens and the vestry of All Saints Parish. The Act expressly enabled the congregation to "have, hold, take and receive" both real and personal property. The congregation's incorporation was only effective for a period of fourteen years. In 1839, the South Carolina General Assembly renewed the incorporation for an additional fourteen years and, in 1852, the General Assembly did so indefinitely.

An 1880 Act of the South Carolina General Assembly established that title to any property belonging to inactive Episcopal corporations, churches, or dormant parishes was held in trust by the Trustees of the South Carolina Episcopal Diocese. The record makes clear that in 1902, due to the 1880 Act, the All Saints congregation became concerned over the status of their incorporation and the status of title to church property. Evidence in the record also indicates that this concern was exacerbated by the destruction of certain property records in a "great storm."

In May 1902, as a result of its concern, the congregation asked the Diocese to "cooperate with [them] in having the charter of th[e] Parish renewed." The Diocese's Chancellor responded positively and not only suggested that the congregation formally incorporate with the Secretary of State as a South Carolina eleemosynary corporation, but also indicated that the Diocese would execute a quit-

claim deed transferring to the congregation any interest the Diocese may have had in the All Saints property.

Therefore, at the direction of the Diocese, the congregation re-incorporated in 1902 under the name "All Saints Parish, Waccamaw, Inc." Shortly thereafter, in 1903, the Trustees of the Diocese signed a quit-claim deed (hereinafter the "1903 Quit-Claim Deed") transferring any interest the Diocese may have had in the congregation's property to All Saints Parish, Waccamaw, Inc. The Diocese did not retain any interest in the property, reversionary or otherwise. The 1903 Quit-Claim Deed was recorded in the Georgetown County public records on May 30, 1903.

In 1987, the Diocese amended its constitution and canons so as to include the "Dennis Canon." The Dennis Canon purports to declare a trust, in favor of the ECUSA and the Diocese, on all real and personal property held by any congregation.[4] No such property canons existed in 1902 when the Diocese directed the congregation to incorporate, or when it executed the 1903 Quit-Claim Deed in favor of the newly created All Saints Parish, Waccamaw, Inc.

In August 2000, due to concern over the status of title to its property, the All Saints congregation con-

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[4] Presumably, the Dennis Canon was enacted in reaction to the Supreme Court of the United States's opinion in *Jones v. Wolf*, 443 U.S. 595 (1979). In *Jones*, the Supreme Court established that the First Amendment did not require a civil court to defer completely to ecclesiastical authorities when adjudicating church disputes.

ducted a formal title examination. The examiner concluded that the 1745 Trust Deed and the 1903 Quit-Claim Deed were the only recorded deeds pertaining to the congregation's property. Soon thereafter, in September 2000, the Diocese recorded a notice in Georgetown County purporting to declare that the congregation held its property, pursuant to the Dennis Canon, in trust for the benefit of the ECUSA and the Diocese ("the 2000 Notice"). Because of the 2000 Notice and the 1745 Trust Deed, the congregation was unable to acquire title insurance.

In October 2000, the congregation, in the name of its corporate entity, All Saints Parish, Waccamaw, Inc., filed a declaratory judgment action against the ECUSA and the Diocese in which it sought an order declaring that the congregation held title to its property or, in the alternative, held its property in trust for the benefit of the inhabitants of the Waccamaw Neck pursuant to the 1745 Trust Deed. The Diocese and the ECUSA answered and counterclaimed asserting that the property was subject to their canons and the 2000 Notice.

By consent order, a guardian *ad litem* was appointed to represent the interests of John and Jane Doe, the unknown heirs of the original trustees to the 1745 Trust Deed, George Pawley and William Poole. The Does and the congregation filed joint motions for summary judgment. The motions were granted and, pursuant to the 1745 Trust Deed, the trial court found that the Does held legal title to the property at issue and that the inhabitants of the Waccamaw Neck held equitable title as beneficiaries to the 1745 Trust Deed. The matter was remanded

to the probate court for further fact finding with respect to the identity of the parties to the 1745 Trust Deed.

The ECUSA and Diocese appealed. The court of appeals found that there were genuine issues of material fact concerning whether the trust created by the 1745 Trust Deed failed when the Church of England ceased to be established as the official religion of South Carolina and whether the Statute of Uses operated to execute the trust. Accordingly, the court of appeals remanded the case to the circuit court. *All Saints Parish, Waccamaw v. The Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 595 S.E.2d 253 (Ct. App. 2004), cert denied, July 2005.

In August 2003, prompted by events that are not relevant here, the congregation appointed a committee to recommend whether it should leave the Diocese and the ECUSA. On December 9, 2003 the committee recommended that the corporate charter of All Saints Parish, Waccamaw, Inc. be amended so as to delete references to the canons and rules of the Diocese and the ECUSA. Specifically, the committee recommended that "Article Fourth"[5] of the 1902 Certificate of Incorporation be amended to read:

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[5] Prior to the amendment, "Article Fourth" read: "The purpose of the said proposed Corporation is to conduct Religious services, and prosecute religious works under the forms and according to the canons and rules of the protestant Episcopal Church, and as a component part of the Diocese of said Church in South Carolina."

The purpose of All Saints Parish, Waccamaw, Inc., also known as All Saints Church, is to create an environment in which all people and especially the inhabitants of the Waccamaw Neck come to know Jesus Christ: to Love Him, to Worship Him, to Learn of Him, to Proclaim Him, and to Minister in His Name.

Furthermore, the committee recommended that the congregation additionally amend its charter so as to affirmatively sever its affiliation with the ECUSA and the Diocese.

On December 17, 2003, after learning of the proposed amendments, Edward L. Salmon, Jr., Bishop of the Diocese, sent a letter to the congregation's wardens and each member of the vestry stating that the congregation's status was reduced from that of a parish to a "mission." In his letter, Bishop Salmon also declared that the members of the congregation's vestry had abandoned their offices.[6]

On December 21, 2003, sixty members of the congregation signed a "Request for Special Congregational Meeting." The purpose of this meeting was to discuss and vote on whether the congregation should take the committee's recommendations and vote to amend its charter so as to change its corporate purpose and sever its affiliation with the ECUSA and the Diocese. Notice of the meeting was sent to the congregation's members on December 23, 2003.

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[6] In his letter, Bishop Salmon did not opine as to the status of the congregation's members in so far as it concerned their ability to meet and vote on corporate action.

On January 8, 2004, five-hundred and seven of the congregation's members attended the Special Congregational Meeting and more than a two-thirds majority voted to amend the congregation's 1902 Certificate of Incorporation adopting the aforementioned amendment to "Article Fourth." Additionally, more than a two-thirds majority voted to amend the charter so as to withdraw from the Diocese and the ECUSA, but remain part of the Anglican Communion by affiliating themselves with the Episcopal Church of Rwanda and its Anglican Mission in America.[7] Accordingly, the corporate secretary for All Saints Parish, Waccamaw, Inc. prepared and signed the Articles of Amendment to the 1902 Certificate of Incorporation. These Articles of Amendment were filed in the South Carolina Secretary of State's office on January 15, 2004.

On January 9, 2005, a small group of members who remained loyal to the Diocese and the ECUSA met with Bishop Salmon and purported to elect a new vestry for the congregation – the minority vestry. Subsequently, on January 16, 2004, the majority group of members re-elected the vestry removed by the Bishop – the majority vestry.

On January 20, 2005, the minority vestry filed the 2005 Action against the majority vestry alleging that they forfeited office by recommending that the congregation sever its affiliation with the ECUSA and the Diocese. The minority vestry sought a dec-

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[7] The Anglican Communion is the worldwide body of Episcopal Dioceses. The Episcopal Church of Rwanda is the Rwandan equivalent of the United States' ECUSA.

laration that they were All Saints Parish, Waccamaw, Inc.'s true officers. Additionally, they sought the return of the congregation's real and personal property. The Diocese and Bishop Salmon joined in the action. Subsequently, the trial court consolidated the 2000 Action and the 2005 Action.

The consolidated cases were tried and, after each of the parties presented its case, the trial court decided both underlying actions as a matter of law. With respect to the 2000 Action, the trial court held that, pursuant to the terms of the 1745 Trust Deed, legal title to the real property remained in the unknown Heirs of George Pawley and William Poole, while beneficial title was possessed by the "inhabitants of Waccamaw Neck."[8] As to the 2005 Action, the trial court held that members of the minority vestry were the true officers of All Saints Parish, Waccamaw, Inc. In its original bench order, however, the trial court declined to eject the majority group from the real property because the identity of the parties to the trust created by the 1745 Trust Deed was yet to be determined by the probate court. Nonetheless, upon a motion for reconsideration, the trial court ordered the Secretary of State to cancel the Articles of Amendment filed by the majority group, ejected the majority vestry from the property it occupied which was not granted to the congregation by the 1745 Trust Deed, and restrained the majority vestry from acting as the officers of All Saints Parish, Waccamaw, Inc.

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[8] The trial court made its ruling on the 2000 Action pursuant to Rule 39(b), SCRCP.

QUESTIONS PRESENTED

This Court granted certiorari to review the decision of the trial court and the parties raise the following issues for review:

I. Did the trial court err in holding that the trust created by the 1745 Trust Deed remains valid?

II. Did the trial court err in holding that members of minority vestry were the corporate officers of All Saints Parish, Waccamaw, Inc.?

STANDARD OF REVIEW

Because the trial court made its ruling on the 2000 Action pursuant to Rule 39(b), SCRCP, the standard of review with respect to the 2000 Action is the same as that for an action at law tried without a jury. In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the court's finding. *Jowers v. Hornsby*, 292 S.C. 549, 552, 357 S.E.2d 710, 711 (1987).

The standard of review for the grant of a directed verdict applies to the review of the 2005 Action. When reviewing a denial of a motion for directed verdict, this Court applies the same standard as the trial court. *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be

drawn therefrom in the light most favorable to the party opposing the motion. *Hurd v. Williamsburg County*, 363 S.C. 421, 426, 611 S.E.2d 488, 491 (2005).

LAW/ANALYSIS

In this case, we are called upon to adjudicate two disputes. The 2000 Action is a dispute between a congregation and its denomination over title to church property. The 2005 Action is a dispute among the congregation's members over corporate control. Because church disputes are very often prompted by disagreements over religious doctrine and belief, the civil courts in this country have addressed them carefully, keeping the First Amendment in mind. The decisions of the Supreme Court of the United States concerning church dispute litigation make clear that there is no constitutionally prescribed rule for a civil court's disposition of such matters. Nonetheless, there is a general constitutional command, based in the First Amendment, mandating that civil courts to "decide church...disputes without resolving underlying controversies over religious doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976).

Within the context of this general constitutional command, the Supreme Court of the United States has expressly approved two methods for a civil court's resolution of church disputes. These approaches have become known as the "deference approach" and the "neutral principles of law approach." We hereby explicitly reaffirm that, when

resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in *Jones v. Wolf*, 443 U.S. 595 (1979), and expressed by this Court in *Pearson v. Church of God*, 325 S.C. 45, 478 S.E.2d 849 (1996). The following context is necessary for a clear understanding of this rule and its application to the facts presented by this case.

The Supreme Court of the United States first approved the "deference approach" in 1871. *See Watson v. Jones*, 80 U.S. 679 (1871). Under this approach, a court must only determine whether a church is "congregational" or "hierarchical" in nature.[9] If the church is congregational, the court will resolve the dispute by deferring to a majority of the congregation. However, if the congregation at issue is part of a hierarchical organization, the court will defer to the decision of the ecclesiastical authorities.

Because the deference approach was, for a long time, the only approach explicitly approved as constitutional by the Supreme Court of the United States, this Court has issued a handful of opinions that are consistent with the deference approach. *See Bramlett v. Young*, 229 S.C. 519, 93 S.E.2d 873 (1956) (holding that a minority group of a local, hierarchical Presbyterian church's members were en-

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[9] "A congregational church is an independent organization, governed solely within itself..., while a hierarchical [or ecclesiastical] church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Seldon v. Singletary*, 284 S.C. 148, 149, 326 S.E.2d 147, 148 (1985).

titled to ownership and control of church property because they were recognized as the true congregation by the hierarchical authorities);*Adickes v. Adkins*, 264 S.C. 394, 215 S.E.2d 442 (1975) (holding that where a majority of a local Presbyterian congregation voted to sever its connection with its hierarchical authorities, the minority faction which the hierarchical authorities recognized as the true congregation was entitled to control of the church properties); *Seldon v. Singletary*, 248 S.C. 148, 326 S.E.2d 147 (1985) (holding that a local church was part of a hierarchical denomination, thus, the minority group of members recognized by the hierarchical authorities were entitled to possession and control of church property). In each of these cases we applied the deference approach and analyzed the issues by determining whether the church at issue was congregational or hierarchical in nature and deferred accordingly. This short analysis disposed of those cases and, in so doing, these decisions complied with the First Amendment's command that "civil courts...decide church property disputes without resolving underlying controversies over religious doctrine."[10] *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976) quoting *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).

The deference approach, which the Supreme Court of the United States never explicitly held was the only constitutional method of adjudicating church disputes, is rigid in its application and does

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[10] This command applies to state courts by way of the Fourteenth Amendment.

not give efficacy to the neutral, civil legal documents and principles with which religious congregations and denominations often organize their affairs. Thus, throughout the country, other approaches to the resolution of church disputes have slowly developed.

In 1979, the Supreme Court of the United States expressly approved the use of a second method of resolving church disputes. In *Jones v. Wolf*, the Supreme Court affirmed a Georgia court's use of the neutral principles of law approach to resolve church disputes. 443 U.S. at 603 (holding that a state is constitutionally entitled to adopt the neutral principles of law approach as a means of adjudicating church disputes). This method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603. Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical. Rather, the neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes.

A clear recitation of the neutral principles of law approach as adopted by this Court was enunciated in *Pearson v. Church of God*. In *Pearson*, we articulated the rule that South Carolina civil courts must follow when adjudicating church dispute cases. We reaffirm and more fully explain this rule here. The *Pearson* rule provides:

(1) Courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration; (2) courts cannot avoid adjudicating rights growing out of civil law; (3) in resolving such civil law disputes, courts must accept as final and binding the decision of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration.

325 S.C. at 53, 478 S.E.2d at 854.

The *Pearson* rule establishes that where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so. Nonetheless, where a civil court is presented an issue which is a question of religious law or doctrine masquerading as a dispute over church property or corporate control, it must defer to the decisions of the proper church judicatories in so far as it concerns religious or doctrinal issues. *See Serbian Eastern Orthodox Diocese*, 426 U.S. at 709 (finding that the controversy before the Court "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which...is for ecclesiastical and not civil tribunals.").

It is with the *Pearson* rule in mind that we now turn to the two issues before us in this appeal. We remain mindful of the First Amendment and its protections of religious liberty. Nonetheless, adjudication of this matter does not require us to wade into the waters of religious law, doctrine, or polity. We find that the Diocese and ECUSA organized their affairs with All Saints Parish in a manner that makes the complete resolution of the questions pre-

sented achievable through the application of neutral principles of property, trust, and corporate law.

I. Property Ownership

Turning to the 2000 Action, the trial court held that the trust created by the 1745 Trust Deed remained valid and that legal title is held by the unknown heirs of George Pawley and William Poole while the beneficial title is held by the "Inhabitants of Waccamaw Neck." We disagree.

Based upon an application of the relevant neutral principles of law, we hold that the trial court erred in determining that the trust created by the 1745 Trust Deed remains valid. Further, we hold that this trust was executed by the Statute of Uses and that title to the property is held by the congregational corporate entity – All Saints Parish, Waccamaw, Inc.

A. The Statute of Uses

It is well established that "where there is a conveyance to one for the use of another, and the trustee is charged with no duty which renders it necessary that the legal estate should remain in him to enable him properly to perform such duty, the Statute of Uses executes the use and carries the legal title to the [beneficial] use." *Faber v. Police*, 10 S.C. 376, 389-90 (1877).[11] Further, in a trust where the trus-

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[11] England enacted the Statute of Uses during the reign of Henry VIII. 27 Henry VIII ch. 10 (1535). It was adopted by the South Carolina Commons House of Assembly in 1712. Act No. 322, 2 S.C. 401 (1712) at 466.

tees have no duties, "the legal and equitable titles are merged in the beneficiaries and the beneficial use is converted into legal ownership." *Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975). Nonetheless, the Statute of Uses will not operate to execute a trust where there is no beneficiary capable of taking legal title. *See Bowen v. Humphreys*, 24 S.C. 452, 455 (1886) (holding that the Statute of Uses cannot execute a trust where there is no identifiable beneficiary capable of holding title).

Therefore, there are two questions that must be asked in order to determine if the trust created by the 1745 Trust Deed was executed by the Statute of Uses: (1) whether the trustees had any duties relative to their office, and (2) whether there is a beneficiary capable of taking title. We hold that the trustees of this trust did not have any duties relative to their office and that the congregation of All Saints Parish was the intended beneficiary and, upon its formation, was clearly capable of taking title.

1. Trustees' Duties

We hold that the 1745 Trust Deed did not impose any duties upon the trustees, George Pawley and William Poole. Pawley and Poole were colonial appointees given the authority to accept conveyances of land for the purpose of establishing parishes. When named trustees to the 1745 Trust Deed, they were acting as appointees of the colony, not as trustees with traditional duties. This conclusion is supported by the relevant legal realities of that time. The court of appeals in *All Saints* correctly stated that "in colonial times, churches could not be recognized by the

government until they owned property, and they could not own property until they had been officially recognized." *All Saints*, 358 S.C. at 225, 595 S.E.2d at 262. "As such, a colonial practice arose in which a settlor placed property in trust for a congregation until such a time as the government recognized the church." *Id.* (citing *Town of Pawlett*, 9 U.S. (Cranch) at 330 (holding "no parish church...could have legal existence until consecration and consecration was expressly inhibited unless a suitable endowment of land.")). Pawley and Poole did not have any duties relative to the trust, but simply acted as custodians of the property at issue until All Saints Parish was officially established. This conclusion is supported by language of the 1745 Trust Deed which did not expressly impose any duties upon them, nor is there any evidence in the record which suggests that either of the trustees performed any acts relative to their office as trustee.

Further, Percival and Ann Pawley were not traditional settlers of a trust. Rather, they sold the property at a price far above nominal value. They were clearly sellers of property to colonially appointed commissioners for the establishment of a parish, purposes specified by the colonial government.

2. Beneficiary Capable of Taking Title

Holding that the trustees to the 1745 Trust Deed had no duties, we now analyze whether there was a beneficiary capable of taking title. According to the terms of the 1745 Trust Deed, the beneficiaries were "the Inhabitants of Waccamaw Neck." This term is ambiguous and parole evidence should be used to as-

certain its meaning. *See Shelley v Shelley*, 244 S.C. 598, 606, 137 S.E.2d 851, 855 (1964)(holding that parole evidence is admissible so long as its admission is merely intended to explain and apply what the settlor has written).

Based on the following application of parole evidence, we hold that the term "Inhabitants of Waccamaw Neck" was used by the settlors of the trust as an expression referring to the yet-to-be-created All Saints Parish. Early South Carolina colonial statutes used the term "inhabitants" when referring to the colony's parishes. For instance, The Church Act of 1706 contains multiple uses of the term "inhabitants" referring to parishes. *See* Act No. 256 at §§ 7, 10, 12, 13, 19, 21, 22, 29, 30, 35, 2 S.C. Stat. 284-89 (1706). Additionally, this understanding of the term is supported by the historical context in which the 1745 Trust Deed was executed. In 1745, the inhabitants of Waccamaw Neck were parishioners of Prince George's Parish. They were clamoring for the establishment of their own Parish congregation and had already been worshipping on the land at issue for approximately eight years. It was within this historical context that the 1745 Trust Deed was executed in expectation that the subject property would be for the benefit of the yet-to-be formed All Saints Parish.

Additionally, according to the express terms of the original Church Act of 1706, a colonial Parish could hold title to land. The Act specifically empowered commissioners "to take up by grant from the Lords Proprietors, or purchase the same for them, or any other person, and have, taken and receive so much land as they think necessary for the several

sites of the several churches." Act No. 256 at § 8, 2 S.C. Stat. 284. Thus, when the Church Act of 1767 formed All Saints Parish, the Statute of Uses operated to execute the trust created by the 1745 Trust Deed and title vested in the intended beneficiary, the congregation of All Saints Parish.

B. 1903 Quit-Claim Deed

Moreover, the 1903 Quit-Claim Deed makes clear that All Saints Parish, Waccamaw, Inc. holds title to its property. The All Saints Parish congregation was officially incorporated in 1820. In 1902, due to doubt over the status of the congregation's incorporation, the Diocese directed it to re-incorporate as "All Saints Parish, Waccamaw, Inc." Shortly thereafter, in order to settle any doubt as to the status of title to Parish property, the Diocese voluntarily executed the 1903 Quit-Claim deed. The 1903 Quit-Claim Deed makes clear that title to the property at issue is currently held by the congregation's corporate entity – All Saints Parish, Waccamaw, Inc.

C. 2000 Notice and Dennis Canon

Furthermore, we hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. A trust "may be created by either declaration of trust or by transfer of property...." *Dreher v. Dreher*, 370 S.C. 75, 80, 634 S.E.2d 646, 648 (2006). It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000

Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

For the aforementioned reasons, we hold that title to the property at issue is held by All Saints Parish, Waccamaw, Inc., the Dennis Canons had no legal effect on the title to the congregation's property, and the 2000 Notice should be removed from the Georgetown County records.

II. Corporate Control

Turning to the 2005 Action, we find that the trial court applied the deference approach, determined that the congregation was part of a hierarchical organization, and deferred to the Diocese's ecclesiastical authority's determination that members of the minority vestry were the true officers of All Saints Parish, Waccamaw, Inc. We disagree.

While it is true that "[c]ourts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration," *Pearson*, 325 S.C. at 53, 478 S.E.2d at 854, the resolution of the 2005 Action does not require such judicial meddling. The 2005 case turns on a determination of whether the Articles of Amendment approved by the members of All Saints Waccamaw, Inc. on January 8, 2004 were adopted in compliance with the South Carolina Non-Profit Act. *See* S.C. Code Ann. § 33-31-1001, et. seq. We find that the Articles of Amendment were lawfully adopted and effectively severed the corporation's legal ties to the ECUSA and the Diocese. Therefore, we find that the mem-

bers of the majority vestry are the true officers of All Saints Parish, Waccamaw, Inc.

Pursuant to the South Carolina Non-Profit Act, a religious corporation may amend its Articles of Incorporation to add or change a provision permitted in the articles or delete a provision not required in the articles. S.C. Code Ann. § 33-31-1001. Amendment to a corporation's articles, to be adopted, must be approved by (1) the board of directors, (2) the members "by two-thirds of the votes cast or a majority of the voting power, whichever is less," and (3) any person whose approval is required by the Articles of Incorporation. S.C. Code Ann. § 33-31-1003(a)(1-3). The passage of the Articles of Amendment approved by the congregation on January 8, 2004 complied with all three of these requirements.

First, the Articles of Amendment were approved by the board of directors. On December 8, 2003, while still in good standing with the Diocese, the majority vestry, acting as the corporation's board of directors, approved the Articles of Amendment at issue here. Thus, the passage of the Articles of Amendment met the requirements of S.C. Code Ann. § 33-31-1003(a)(1).

Second, the Articles of Amendment were approved by the members of All Saints Parish, Waccamaw, Inc. by two-thirds of the votes cast. Five hundred and seven members of All Saints Parish, Waccamaw, Inc. were present at the January 8, 2004 meeting which was called to discuss and vote upon the Articles of Amendment. Of the five hundred and seven members present, four hundred and sixty-four

votes were cast in favor of amending the Articles of Incorporation. Therefore, more than nine-tenths of the votes cast were in favor of the amendments, clearly more than the two-thirds statutorily required. There is no evidence in the record to suggest that the members present and voting were not in good standing at the time of the vote. Thus, the passage of the Articles of Amendment clearly met the requirements of S.C. Code Ann. § 33-31-1003(a)(2).

Finally, nothing in the All Saints Parish, Waccamaw, Inc. by-laws or the Constitutions and Canons of the ECUSA or Diocese requires third-party approval for amendments to the congregation's corporate charter, therefore the congregation's adoption of the Articles of Amendment complied with the requirements of S.C. Code Ann. § 33-31-1003(a)(3). The statutory provisions pertaining to a religious corporation's amendment of its corporate charter were amended in 1994 so as to add the option of third-party approval. *See* 1994 S.C. Acts 384. There is no evidence in the record that, since that time, the Diocese has ever attempted to gain approval power over amendments to the All Saints Parish, Waccamaw, Inc. corporate charter.

The facts presented by this case demonstrate that the congregation, in compliance with relevant statutory provisions and applicable bylaws, passed the Articles of Amendment, thus removing any reference to the ECUSA and Diocese and explicitly severing any legal relationship with those organizations. Therefore, through the application of neutral principles of law, it is clear to us that the true officers of

All Saints Parish, Waccamaw, Inc. are the members of the majority vestry.

CONCLUSION

For the foregoing reasons, we reverse the trial court's decision with respect to both the 2000 Action and the 2005 Action.

WALLER, BEATTY, JJ., Acting Justice James E. Moore and Acting Justice Perry M. Buckner, concur.

Supreme Court, U.S.
SEP 8 -

(7)

No. 08-1579

IN THE

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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[1] The Modification of Opinion issued by the California Supreme Court on February 25, 2009, was inadvertently omitted from the Appendix. It is included here, paginated sequentially from the original Appendix included with the Petition.

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ARGUMENT

I. The Decision Below Is Final With Regard to the Interpretation of *Jones v. Wolf*, §9142(c), and the Constitutional Issues Raised by Both.

The finality rule of 28 U.S.C. §1257(a) has "not been administered in such a mechanical fashion" as "to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). This Court has noted that "[t]here are now at least four categories" of cases where it will exercise jurisdiction despite further anticipated proceedings in the state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). A state court judgment can be final with respect to the federal issue, for example, when the federal issue is conclusive, or "where the federal claim has been finally decided" and later review of the federal issue may be foreclosed. *Id.*, at 479.

The decision below provides a final interpretation of California Corporations Code §9142(c) and its constitutionality. Indeed, Respondents have argued on remand that the decision below resolves the entire case. Petition for Writ of Mandate 17-19 (Cal.Ct.App., Aug. 12, 2009).[1] While the trial court

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[1] If the position Respondents have advanced on remand were correct, then finality jurisdiction would clearly be appropriate under the fourth *Cox Broadcasting* exception, which covers "those cases in which there are further proceedings—even en-

has correctly rejected Respondents' position that the California Supreme Court "closed the door" on all further litigation—the case went up on appeal before an answer to the Diocese's complaint had even been filed—the judgment interpreting a state statute and upholding its constitutionality can nevertheless be deemed "final" for purposes of §1257(a). As this Court noted in *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964), a case that similarly involved a state court determination of the constitutionality of a state statute and remand for further proceedings, "[t]he fact that separate and unresolved issues are pending in the [state] courts and subject to 'further proceedings' therein . . . does not render the judgment of the [state] Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. §1257."

The decision below is also final with respect to the California Court's interpretation of the "neutral principles" approach ratified by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), specifically including that, in its view, crediting a general church canon purportedly enacted thirty years after a separately-incorporated local church took title to property is a constitutionally valid application of neutral principles of law that does not impermissibly decide matters of religious doctrine. That Petitioners will now have the opportunity on remand to raise other, state law grounds on which they might prevail places this

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tire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S., at 479.

case squarely within the fourth *Cox Broadcasting* exception:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S., at 482-83.

It is undisputed that "[t]he deeds to the property have been in the name of" St. James Church ever since 1950, and also undisputed that neither the deeds nor any other conveyance from St. James Church ever created an express trust in favor of the Episcopal Church. Pet.App.5a, 27a. Reversal of the state court's determination on the federal issues would therefore very likely be dispositive under the pure neutral principles approach embraced by this Court in *Jones*.

Leaving the decision in place, on the other hand, could seriously erode this Court's strong preference for a neutral principles approach if Petitioners were to prevail on state law grounds after remand, leaving the California Court's unconstitutional interpretation of state law in place and beyond challenge. It would also exacerbate uncertainty regarding church property ownership, litigation over which has become endemic in the past decade. *See, e.g.*, B. Goodman, "A Church Is Divided, And Headed For Court," New York Times, A20 (Dec. 5, 2007) ("[Religious rifts] have flooded the courts with civil lawsuits over church property").

The very ability of local congregations to freely exercise their religion in church property to which they have title is at stake. This Court should exercise its discretion to review the matter now, providing the state courts greater clarity on how properly to apply "neutral principles of law" in resolving church property disputes before further loss of Free Exercise rights results. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (calling uncertainty about First Amendment rights "intolerable").

Because there is sufficient finality on the federal constitutional questions presented by the decision below to qualify for this Court's review under *Cox Broadcasting*, §1257(a) is not a bar to this petition.

II. There Are No Adequate and Independent State Law Grounds Barring Consideration of the Constitutionality of §9142(c), or of the Erroneous Application of "Neutral Principles."

Respondents make two arguments in support of their contention that the decision below is supported by adequate and independent state law grounds: That the California Court reached the same conclusion under neutral principles of state law as it reached under §9142(c); and that the judgment was also based on the Court's holding under the state's anti-SLAPP statute.

With respect to the SLAPP argument, Petitioners agree that the judgment below affirmed reversal of the trial court's Anti-SLAPP ruling. Were that all it did, an argument that adequate and independent state law grounds supported the judgment might well be valid. But the Court below went beyond the first prong of the Anti-SLAPP analysis—whether the claims arose from protected speech—to the second prong of the analysis addressing the merits. Cal. Code Civ. Proc. § 425.16; Pet.App.10a, 172a. The Court below also affirmed reversal of the trial court's favorable ruling on Petitioners' Demurrer to the Complaint-in-Intervention that was filed by the Episcopal Church. BIO, at 9; Pet.App.7a-8a, 37a, 148a, 167a-169a. Because both rulings were tied to the Court's interpretation of §9142(c) and to its holding that §9142(c), so interpreted, met *federal* constitutional standards, Pet.App.35a, the first-prong SLAPP holding is not an *adequate* state law ground that would preclude this Court's review; it is not "sufficiently broad to maintain" the entire judgment.

Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875).[2]

With respect to the neutral principles argument, Respondents' contention that the California Court merely applied neutral principles of law to reach the same conclusion that it reached under §9142(c), giving dispositive weight to a post-hoc Church canon, begs the second of the two questions presented in the petition for certiorari, namely, whether such an application of neutral principles can be sustained under the First Amendment. That is not an "independent" state law ground for the decision, but rather one tied directly to Petitioners' constitutional challenge, providing for jurisdiction in this Court. *See, e.g., Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984).

III. Respondents' Description of the *Jones* Neutral Principles Approach Demonstrates Why Certiorari Is Necessary.

In *Jones*, this Court identified the following neutral sources of law that might be consulted to resolve church property disputes: "the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property." *Jones*, 443 U.S., at 600. Respondents read this passage as

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[2] *Miss. & Kan. Interurban Ry. Co. v. City of Olath*, 225 U.S. 185 (1911), is inapposite. There remained the prospect for either leave to amend or entry of final judgment, and of course the case did not address the fourth exception to finality from *Cox Broadcasting*, decided nearly sixty-five years later.

creating a strong presumption in favor of claims by the general church: "If courts found a provision in any of those sources restricting local church property use by a denomination and conferring a right to the property on the broader church, they enforced it." BIO at 20-21.

Respondents characterization of *Jones* is unbelievably far-reaching in its implications. Far from demonstrating that this case "does not raise any unresolved constitutional issues," it highlights just how profound the constitutional issues are. Here are just a few of them:

1. Does such a "thumb-on-the-scale" approach to church property disputes deprive local congregations of their Free Exercise right to organize their religious affairs as they see fit, or give an unconstitutional preference to hierarchical churches?

2. Can assertions of a trust interest, created unilaterally by the beneficiary of the interest and without ratification by the settler of the trust, in violation of long-standing neutral provisions of state law, be upheld when the claimant of the trust is a general church, without offending the Establishment and Free Exercise Clauses?

3. Even if unilateral assertions of trust interests made in a general church's canons can be upheld, can they be given retroactive effect without infringing the free exercise rights of local church congregations that purchased church property for their own use, free and

clear of any trust or reversionary interest by the general church?

Jones does not definitely answer any of these constitutional questions. Respondents' contention that no such questions remain demonstrates just how necessary further review by this Court is. Did this Court in *Jones* really intend to federalize state trust law, for example, requiring that a denominational trust rule enacted by a putative beneficiary must be given dispositive effect even if it cannot be enforced under neutral principles of state trust law, or did *Jones* instead mean that trust claims contained in general church canons would be enforced if enacted in compliance with neutral principles of state trust law? Not to get too much into the merits here, but the passage in *Jones* noting that the neutral principles method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," 443 U.S., at 603, strongly suggests the latter. Certiorari is certainly warranted to consider whether California's adoption of the former is consistent with *Jones*, or constitutionally permissible.

a. The California Court's Interpretation of §9142(c) Likewise Raises Serious Constitutional Issues.

The California Court's interpretation of §9142(c) exacerbates the disconnect between the neutral principles approach sanctioned by this Court in *Jones* and the holding below. Far from being "consistent with how California courts treat all voluntary associations," as Respondents claim, we are aware of no other instance in which a voluntary association

can unilaterally create a trust interest for itself in the vested property rights of its members, and even a cursory reading of the cases relied upon by Respondents reveals that they do not authorize an association's taking of the vested property rights of its members.

The Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9, 118 Cal.App.2d 78 (1953), for example, held that where *members* of a fraternal lodge depart, they cannot take the *lodge's* property with them. But St. James Church is not seeking to take property owned by another; it is merely retaining property *to which it has held clear legal title* for almost six decades. *Cal. Dental Ass'n v. American Dental Ass'n*, 23 Cal.3d 346 (1979), and *Gear v. Webster*, 258 Cal. App. 2d 57 (Ct. App. 1968), also relied upon by Respondents, both dealt with membership rules, not vested property rights. In neither case did the courts purport to allow self-creation by the general association of a trust interest in the vested property of the association's members.[3]

The mention in *Jones* of "state statutes governing the holding of church property" as one of the sources of neutral principles of law was likely not intended to refer to state statutes that allowed general

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[3] The charitable trust doctrine, which would allow *donors* to challenge whether funds given to a charity are being devoted to the purposes for which the funds were given, is likewise inapposite. The Episcopal Church is not a donor to St. James, and even if prior donors were parties to this suit, because St. James remains devoted to religious purposes, resolving such a claim would require resort to the "departure from doctrine" test that this Court has held to be unconstitutional. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 443 and n.2 (1969).

churches to bypass the normal, "well-established concepts of trust and property law familiar to lawyers and judges" such as the requirement of the creation of a trust or reversionary interest be in writing, in a document signed by the settler of the trust or owner of legal title to the property. That California now allows such a thing raises serious First Amendment issues that ought to be reviewed by this Court.

IV. The State Court Split is Significant.

Respondents' argument that there is no split among the state courts warranting this Court's review appears to be based on the view that the neutral principles analysis has been fully developed and applied by this Court and uniformly followed by state courts. Quite apart from the obvious straw man arguments (such as the claim, at pages 32-33, that there is no state court split over the interpretation of §9142(c), a California statute), recent academic studies of this area of law correctly describe state court attempts to apply the neutral principles of law approach approved in *Jones* as a "welter of contradictory and confusing case law." J. Fennelly, "*Property Disputes and Religious Schisms: Who is the Church?*" 9 St. Thomas L. Rev. 319, 353 (Winter 1997).

Respondents also take issue with Petitioners' claim that some courts view a hierarchical deference approach as constitutionally compelled. Although the New Jersey Court noted that "neutral principles" is another acceptable method of adjudicating church property disputes, it specifically held that "[o]nly where no hierarchical control is involved, should the

neutral principles of law principle be called into play." *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 417 A.2d 19, 24 (N.J. 1980). The West Virginia Court reached the same conclusion in *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W. Va. 1984), finding that the First Amendment "dictate[d]" a deference to hierarchy approach once the church was determined to be hierarchical. Although that Court would, in *dictum* in a *footnote* in a *per curium* opinion, later recognize the constitutional validity of a neutral principles approach, it simultaneously reiterated that the longstanding position espoused in *Noel* was "[d]ue to First Amendment entanglement considerations." *Original Glorious Church of God in Christ, Inc. of Apostolic Faith v. Myers*, 367 S.E.2d 30, 33, 34 n.6 (W.Va. 1988). Thus, even if New Jersey and West Virginia have somewhat backed away from the hardline approach to hierarchical deference they originally took—a point recognized in the petition, at 31 n.13—both states have clearly adopted an approach different from other states.

Much more important is the stark split between California and Arkansas in the two cases currently pending before this Court. Respondents misread the footnote in *Arkansas Annual Conference of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 436 n.1 (2009), and elide over the language that makes their misreading evident. The argument that "AME did not make . . . before the circuit court" was that the local church had consented to the Dennis Canon-like amendment "by their silence," not that such an amendment existed at all. Indeed, the Arkansas Court specifically con-

sidered another provision of the general AME Book of Discipline providing that local church property "was to be held in trust for use of the members of the National AME under the rules of the *Book of Discipline*," yet still found in favor of the local church because nothing in its deeds suggested that the grantor "had the intention of creating a trust in favor of" the National AME. *Id.*, at 436-38.

Also important is the split among state courts over the retroactive effect of unilateral trust declarations in general church canons by the putative beneficiaries of the trust. Respondents largely ignore this split, referring to *another* Arkansas decision than the one cited in the Petition, which did not address the retroactivity issue, and ignoring entirely the Alabama and Connecticut decisions cited in the petition. And contrary to Respondents' intimation, the California Court below did not hold that the Dennis Canon merely restated prior policy of the Episcopal Church; it simply acknowledged that "a strong argument exists" for that position. Pet.App.28a. The split on retroactivity is real, and because St. James Church took title to its property long before the Dennis Canon was supposedly enacted, this case is an appropriate vehicle to address it.[4]

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[4] Respondents also claim that a 1991 amendment to St. James Church's articles of incorporation somehow ratified the Dennis Canon. There is no mention in the 1991 amendment of the Episcopal Church or its canons generally, much less the Dennis Canon in particular. Pet.App.162a. Quite the contrary; the 1991 amendment specifically authorizes the corporation, upon dissolution, to distribute its assets "to a nonprofit fund, founda-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 8, 2009.

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tion, or corporation which is organized and operated exclusively for [tax-exempt] religious or charitable purposes."

APPENDIX

APPENDIX E

Filed 2/25/09 (corrected version of modification order previously posted this date)

IN THE SUPREME COURT OF CALIFORNIA

	)	
	)	S155094
	)	Ct.App. 4/3
EPISCOPAL CHURCH	)	G036096,
CASES	)	G036408 &
	)	G036868
	)	Orange County
	)	JCCP No. 4392
_____	)	

MODIFICATION OF OPINION

THE COURT:

The opinion herein, filed on January 5, 2009, and appearing at 45 Cal.4th 467, is modified as follows:

The first sentence in the second full paragraph on page 473 [Pet. App. 2a] is modified to read: "Applying the neutral principles of law approach, we conclude, on this record, that the general church, not the local church, owns the property in question."

The third full paragraph on page 476 [Pet. App. 8a] is modified to read: "We granted review to decide

whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and to address the merits of the church property dispute."

The first full paragraph on page 478 [Pet. App. 10a], under "B.," is modified to read: "Both lower courts also addressed the merits of the dispute over ownership of the local church — the trial court found in favor of the local church and the Court of Appeal found clear and convincing evidence in favor of the general church. We will also address this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to analyze the dispute of this case."

The first sentence of the first full paragraph on page 493 [Pet. App. 37a] is modified to read: "For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, on this record, when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church."

This modification does not affect the judgment.

Supreme Court, U.S.
FILED
JUL 27 2009
OFFICE OF THE CLERK

No. 08-1579

IN THE
Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *et al.*,

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF FOR *AMICI CURIAE* CHRIST CHURCH, FALLBROOK, CALIFORNIA, ET AL. IN SUPPORT OF PETITIONERS

(Additional Amici Listed on Inside Front Cover)

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ST. MICHAEL & ALL ANGELS EPISCOPAL CHURCH, LAKE CHARLES, LOUISIANA,

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STATUTES

California *Corporations Code, section* 9142(c) . . . 8

ARTICLES

The New York Times, December 5, 2007 9

"(Religious rifts) have flooded the courts . . ."

United Methodist News Service, July 17, 2002 . . . 9

Ventura County Star, April 20, 2007 10

"A Small Church at Center of Big Debate"

OTHER AUTHORITY

Bishops' Statement on the Polity of the Episcopal Church http://www.anglicancommunioninstitute.com 2009/04/bishops-statement-on-the-polity-of-the-episcopal-church/ 6,7

Rectors' Declaration of Support for the Bishops' Statement on the Polity of the Episcopal Church . . 7

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ENG HTM .htm 7

INTEREST OF AMICI CURIAE

Christ Church, Fallbrook, California, St. Luke's of the Mountains Anglican Church, La Crescenta, California, St. Anne's Anglican Church, Oceanside, California, St. Michael & All Angels Episcopal Church, Lake Charles, Louisiana, and Traditional Values Coalition Eduction And Legal Institute, Anaheim, California, submit this amicus curiae brief in support of the petition for writ of certiorari.[1]

Christ Church, St. Luke's of the Mountains Anglican Church, and St. Anne's are churches that have been sued by the Episcopal Church to wrest their property from them.

St. Michael & All Angels Episcopal Church joins in asserting that the Episcopal Church is not a hierarchal church but in fact is a voluntary association of equal dioceses without any hierarchal structure at the national level.

As churches we are also affected in our finances by the uncertainty in the law of church property ownership. Churches and synagogues in particular are funded by the voluntary donations of congregants, which oftentimes is sacrificial giving. Uncertainty in

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[1] U.S. Supreme Court Rule 37.6: Amici Curiae disclose that (1) no counsel for a party to this dispute authored this brief in whole or in part, and (2) no person or entity other than Amici Curiae made a monetary contribution to the preparation or submission of this brief.

U.S. Supreme Court Rule 37.2(a): Petitioners and Respondents consented to the filing of this brief. Consent letters have been provided to the Clerk of this Court.

church property law chokes-off money for capital campaigns and casts doubt on the estate planning of those who cannot be sure of the ultimate beneficiary of their generosity.

Traditional Values Coalition is a public policy organization that speaks on behalf of over 43,000 churches, bridging racial and socio-economic barriers, and includes most Christian denominations across the United States. Traditional Values Coalition works regularly with members of the House and Senate and their staffs on a variety of issues of concern to churches.

SUMMARY OF ARGUMENT

I.

Courts should eschew inquiring into church polity and doctrine because:

1. The matter is fraught with First Amendment reefs and shoals, and the inquiry itself is entangling for the courts;

2. The quagmire of Protestant church doctrinal and polity issues is wasteful of judicial resources; and

3. It is not necessary for the courts to involve themselves in such issues.

II.

The Court should grant review because:

1. The *St. James Church* case[2] is of national interest;

2. Litigation of church property ownership has become endemic in America in this decade, with many Protestant denominations, religions and faith groups affected by this case;

3. The States are in conflict on whether they must defer to a church hierarchy or may use neutral principles of law to resolve church property issues; and

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[2] *The Rector, Wardens and Vestrymen of St. James Parish in Newport Beach, California, et al., v. The Protestant Episcopal Church in the Diocese of Los Angeles, et al.*, 45 Cal. 4th 467 (2009)

4. The religious landscape has evolved in America to the point where churches no longer fit into the neat categories of "hierarchal" or "congregational."

ARGUMENT

1.

COURTS SHOULD ESCHEW INQUIRY INTO CHURCH POLITY AND DOCTRINE

This *amicus curiae* brief focuses on a single question: Should the courts be attempting to ascertain whether and to what extent a Protestant church is hierarchal?

We argue that the courts should not be so engaged because (1) the matter is fraught with First Amendment reefs and shoals, and the mere inquiry is entangling for the courts; (2) the quagmire of Protestant church doctrinal and polity issues wastes judicial resources, and (3) it isn't necessary for the courts to involve themselves in such issues.

1. FIRST AMENDMENT HAZZARDS. The courts should not be ascertaining church polity as doing so invites issues of an establishment of religion. Establishment can occur by accepting one litigant's position as over and against another's, as was done by the California court in this case [45 Cal.4th 467 (2009)][3], or by siding in contested issues of church polity; thereby in either case lending approval to one religious body in its controversy with another religious body.

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[3] In giving a canon of the Episcopal Church dispositive weight the California court accepted the Episcopal Church's self-serving representation that it is purely a hierarchal church. The court ignored St. James Church's claim to the contrary. (No evidence existed as the case came before the court on pretrial motions.)

2. **JUDICIAL QUAGMIRE**. Whether, to what extent, and for what purposes, a particular Protestant religious body is "hierarchal" is not easily determined by a court.

The plethora of Protestant denominations in America present many doctrinal variations and church polity configurations.

Whether the Episcopal Church is hierarchal is hotly disputed within the Episcopal Church itself. In a recent example, the Episcopal Church's position that it is purely hierarchal is sharply disputed by fourteen Episcopal bishops who, on April 18, 2009, issued a *Statement on the Polity of the Episcopal Church*.[4]

These bishops claim their church isn't hierarchal at all but is a *voluntary confederation* of local dioceses that may disassociate at will. The *Statement* contends that authority exists only at the diocesan level, based on the structure of the church as "that of a voluntary association of equal dioceses." They note that the Constitution and Canons of the Episcopal Church make no provision either for a central hierarchy or for a Presiding Bishop (archbishop) with authority over bishops.

Further, the bishops note, the General Convention of the church is a body whose voting members are drawn from diocesan deputations. Nor, say these bishops, do the bishops, priests or deacons

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[4] *Bishops' Statement on the Polity of the Episcopal Church* (15 pages) is available online at: http://www.anglicancommunion institute.com/2009/04/bishops-statement-on-the-polity-of-the-episcopal-church.

(the ordained clergy) acknowledge or submit to any central hierarchal authority or archbishop. The bishops' position is supported in a declaration signed by the rectors (head pastors) of fifty-six Episcopal Churches.[5] (Delegates to the Convention of the Diocese of Albany of the Episcopal Church meeting June 5-7, 2009 overwhelmingly passed a resolution supporting the Bishop's Statement.)

A large body of work by canon lawyers, theologians, and church historians, rooted in historicity stretching back to the Colonial period, undergirds the bishops' position (if not contrary views).

Apologists for the Episcopal Church would have it otherwise, of course, and their own views are aptly stated, too.[6]

3. THE COURTS NEEDN'T GO THERE. *Jones v. Wolf*, 443 U.S. 595 (1979), pointed the way by approving neutral principles of law as the means of avoiding these kinds of problems. The courts can and should refrain from inquiry into church polity and doctrinal matters by employing a purely neutral principles of law doctrine, treating church property disputes the same as other property disputes. This is

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[5] *Rectors' Declaration of Support for the Bishops' Statement on the Polity of the Episcopal Church*, (6 pages) is available at http://www.anglicancommunioninstiute.com/2009/05/cprectors-declaration-of-support-for-the-bishops-statement-on-the-polity-of-the-episcopal-church.

[6] For example, see http://www.episcopalchurch.org/79901_107043_ENG_HTM.htm where a number of attacks on the *Bishop's Statement* are collected.

the wisdom of the *Jones* court, and it should be clarified by this Court as the standard for deciding church property cases.

II.

THE COURT SHOULD GRANT REVIEW

The California Supreme Court impermissibly decided a matter of religious doctrine and polity by determining that the Episcopal Church is hierarchal and therefore entitled to an exemption from the application of California law not accorded non-hierarchal churches.

Specifically, the California decision lets a hierarchal church grab the land and buildings of a local congregation by unilaterally declaring that such property is "held in trust."[7]

The Court should grant *certiorari* because (1) the *St. James Church* case is of national interest; (2) litigation over church property has become endemic in this decade, with many Protestant denominations affected by this case; (3) States are in conflict on whether they must defer to a church hierarchy or may utilize neutral principles of law to resolve church property issues, and (4) the religious landscape in America has evolved to the point where churches no longer fit into the neat categories of "hierarchal" or "congregational."

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[7] This was accomplished by interpreting California *Corporations Code* section 9142(c), as giving preference to "hierarchal" churches. *Episcopal Church Cases*, 45 Cal. 4th at 485-493.

1. THE NATIONAL INTEREST IS DEMONSTRATED. The *St. James Church* case has attracted national, indeed international, interest evidenced by a multiplicity of stories about it in the print media, including, for example, *The New York Times* (5 articles), *Newsday, The Los Angeles Times* (31 articles), *The Washington Post, and The Christian Science Monitor*, and a plethora of other newspapers, magazines and wire services, including *Associated Press*, *City News Service*, and *Religious News Service*.

Electronic media coverage has included national reporting by *CNN*, *The McNeil/Lehrer News Hour, Fox News National with Shepard Smith,* and the *British Broadcasting System (BBC)*, as well as thoughtful stories and chatter on countless radio hookups, such as *Fox News* and *Focus on the Family*, and websites and blogs, including the *Wall Street Journal Law Blog*.

2. CHURCH PROPERTY LITIGATION IS ENDEMIC. Litigation of church property ownership has become endemic in this decade, as documented by sources as disparate as *The New York Times* and the *United Methodist Press Service*.[8]

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[8] "(Religious rifts) have flooded the courts with civil lawsuits over church property, an area of jurisprudence where courts, as they try to navigate First Amendment separation of church and state, are notoriously uncomfortable." *The New York Times*, December 5, 2007.

"The United Methodist Church has guidelines for handling disputes over church property, but that doesn't stop some cases from landing in civil courts." *United Methodist News Service*, July 17, 2002.

Without conducting an exhaustive analysis we know that the Episcopal Church has now brought no fewer than fifty-five lawsuits seeking to wrest church property from local congregations, and that the Presbyterian Church has likewise brought dozens of such cases. Other church parent bodies have brought other such cases; for example, the Russian Orthodox Church which is suing a tiny California congregation for its church building.[9]

3. THE STATES ARE IN CONFLICT. Justice Powell was prescient in his dissenting opinion in *Jones v. Wolf.* "(N)ot only questions of state law but also important questions of federal constitutional law . . . are left to the state courts for their decision . . . and they will travel a course left totally uncharted by this Court." *Jones*, 443 U.S. at 616.

The result is a perfusion of contradictory and often very confusing authority, as States have grappled with *Jones v. Wolf,* earlier authority such as *Watson v. Jones,* 80 U.S. [13 Wall] 679 (1872), and other cases.

Some States believe they are unfettered in following neutral principles of law, either because it is constitutionally mandated or permissible and preferable. These would appear to include Alabama, Alaska, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, Pennsylvania, South Dakota and Tennessee.

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[9] *Ventura County Star*.com, April 20, 2007, "A Small Church at Center of Big Debate."

At or near the other bookend, some States consider themselves either constitutionally bound to defer to church hierarchy or else they prefer to do so. These appear to include Florida, Iowa, Michigan, New Jersey, Nevada, North Carolina, Oklahoma, Texas, Washington and West Virginia.

Then there are the "mixed-results" States falling within the sprawl of authority. These include Connecticut, Pennsylvania and Wisconsin.

The variety of decisions involving just the application of neutral principles of law is quite amazing. For example, Arkansas and New Hampshire have based decisions on whether church canons must be considered in neutral principles, and whether that means preexisting canons or canons imposed after the property was acquired.

California has now plunged the neutral principles of law approach further into confusion by purporting to apply neutral principles while actually deferring to a self-proclaimed hierarchal church. As noted in her "concurring and dissenting opinion" California Justice Kennard declared that this was not the application of neutral principles of law at all but an entirely different breed of cat: "*the principle of Government approach*," which she thought permissible under the First Amendment. At issue was California's interpretation of legislative *fiat* to permit the creation of a trust interest by a non-owner of the trust corpus.[10]

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[10] "Dissenting and Concurring Opinion" by Kennard, J., *Episcopal Church Cases*, 45 Cal.4th at 495-496.

The whirlpool of conflicting State authority has resulted from disagreements about the requirements of the Constitution that only this Court can resolve.

4. POLITY CATEGORIES NO LONGER SERVE. The deference to hierarchy approach is rooted in *Watson v. Jones*, decided at another time in America's religious history. Today there are thousands of diverse churches, religions and faith groups. Few are as rigidly hierarchal as the Roman Catholic Church or as plainly congregational as the Congregational Churches of a hundred forty years ago. Thus, except for strictly hierarchal churches like the Roman Catholic Church and the Church of Jesus Christ of Latter Day Saints, church property law is unpredictable for America's churches, religions and faith groups.[11]

CONCLUSION

We respectfully offer that it is needful and very timely for this Court to quell the confusion and to settle the disarray of authority among the various States concerning ownership of religious property.

This case presents the opportunity to establish neutral principles of law as the standard for determining issues of religious property ownership.

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[11] Occupying one end of the spectrum, the Roman Catholic Church seems to do it right: it owns lands and buildings and assumes the concomitant responsibilities. However, the Episcopal Church and others including the Presbyterian Church want it both ways: pushing the purchase and all of the responsibilities and *liabilities* of property ownership off onto the local congregation, then claiming ownership for themselves.

For the above-stated reasons the Court should accept this case for review.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICUS CURIAE* THE CHURCH OF THE GOOD SHEPHERD IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Memorial Church of the Good Shepherd ("Good Shepherd"), is a Pennsylvania nonprofit corporation that has been a parish of The Episcopal Diocese of Pennsylvania ("the Diocese") since 1870. Good Shepherd's original 1870 charter remains today as its governing document and has been amended only once, in 1907, to change its corporate name. Since its 1870 foundation, Good Shepherd's property has been titled solely and exclusively in its own name apart from a period beginning in 1910, when Good Shepherd granted and conveyed the property to trustees for the Diocese, who, in 1967, granted and conveyed all the property back to Good Shepherd. Good Shepherd's property has remained titled solely and exclusively in its own name since the Diocese's reconveyance.

On February 19, 2009, the Diocese filed an action in Pennsylvania state court to claim Good Shepherd's real and personal property, asserting that the property "is held in trust for the Episcopal Church and the Diocese" on the basis of internal church canons and constitutions unilaterally adopted by those bodies, declaring that the local congregation holds its property in trust for the national church hierarchy. These

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief, and the parties have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

church canons and constitutions were adopted *after* Good Shepherd obtained title to its property. Ultimately, the state court action against Good Shepherd arises from the Diocese's decision in 2002 to inhibit the sacramental and spiritual ministrations of the incumbent rector of Good Shepherd and to depose him as pastor in consequence of doctrinal, ecclesiological, and canonical disputes between the parties regarding: priestly and episcopal ordination, clerical status, and religious vows; ecclesiastical authority and spiritual jurisdiction; exercise of priestly and episcopal faculties and pastoral direction; acquisition, holding, and loss of ecclesiastical office; and abandonment *vel non* of religious communion with the Episcopal Church.

Many of the same or similar church canons and constitutions upon which the Diocese is basing its claim of ownership of Good Shepherd's property in the Pennsylvania case, are now at issue in the case before this Court. Accordingly, this case presents several important constitutional issues that will largely, if not entirely, determine the disposition of material aspects of Good Shepherd's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

While church property disputes implicate both of the Religion Clauses, this Court's case law on the subject developed primarily by building on itself, rather than explicitly drawing upon broader Establishment Clause and Free Exercise Clause cases. This Court's last pronouncement on church property disputes, *Jones v. Wolf*, 443 U.S. 595 (1979), a thirty-year-old 5-4 decision, was the culmination of this fairly

insular body of case law. There has been considerable development of doctrine under the Religion Clauses since *Jones*, and the questions presented by this case provide an excellent vehicle for the Court to perfect its church property dispute doctrine and to synthesize and refine Religion Clauses jurisprudence.

While *Jones* strongly endorsed a neutral principles of law approach to judicial resolution of church property disputes, courts have read it to continue to permit a very different approach: judicial deference to the religious governance documents of churches organized in a particular fashion, even where the church documents solely address secular property issues. Such judicial deference: offends both of the Religion Clauses; is inconsistent with this Court's continuing trend toward applying neutral principles of law; and raises Equal Protection issues as well.

The fundamental constitutional issue is whether the proper standard for resolving church property disputes is that of "neutral principles of law" or that of "deference to hierarchical church governance." The hierarchical deference standard is often chimerical since many denominations are hybrid organizations, bearing both congregational and hierarchical characteristics. Under the hierarchical deference approach, hybrid organizations, such as the Episcopal Church, often require civil courts to make complex ecclesiological and theological judgments on various different entities in denominational organizations, which violates the First Amendment.

In this case, as in Good Shepherd's own case, the Episcopal Church characterizes itself as hierarchical – and, in fact, the ultimate ecclesiastical hierarchy –

while, on the one hand, claiming to be part of the Anglican Communion and, on the other hand, simultaneously deemphasizing its hierarchical nature in clergy sexual abuse cases. Is the Episcopal Church hierarchical? If so, to which member of the hierarchy should the courts defer: the parish, the diocese, the national denomination, or the worldwide Anglican Communion?

The hierarchical deference standard also violates the Establishment Clause by requiring judicial deference to decisions of religious hierarchical organizations, which deference is not accorded to similar acts of secular voluntary associations. Church canons and constitutions imposing unilaterally created trusts should not abrogate state trust law, which requires that a settlor – not a beneficiary – manifest its intent to create a trust in a written instrument. Similarly, church hierarchies should not be exempt from state law requirements for creating and recording property interests that apply to secular voluntary associations. By elevating the Dennis Canon over clear record title and basic state trust law, the California Supreme Court assumed what was in dispute – namely, the Episcopal Church's doctrinal contention that it was a purely hierarchical church and thus "superior" or "general" under Section 9142(c) of the California Corporations Code.

Apart from the fundamental conceptual deficiencies of the hierarchical deference standard, application of the hierarchical deference and neutral principles of law standards has produced abundant confusion among state courts about what the Constitution mandates, permits, or forbids in church property

disputes.[2] The interplay between this Court's decisions in *Jones*, on the one hand, and *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), on the other, has caused confusion over whether deference to the decision rendered by the highest church judicatory to which it was presented in a hierarchical church is mandatory, or, whether civil courts can apply neutral principles even if the church is recognized to be hierarchical. The inconsistency between the Pennsylvania Supreme Court's decisions in *The Presbytery of Beaver-Butler of the United Presbyterian Church of the United States of America v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317 (1985), and *In re Church of St. James the Less*, 585 Pa. 428, 888 A.2d 795 (2005), illustrates the confusion that has occurred throughout the rest of the country. And the California Supreme Court's decision below reflects that same confusion, as the court adopted a neutral principles approach in name, but applied a hierarchical deference standard in practice, giving the force of law to an ecclesiastical edict that permits a non-owner to gain control of property by simply declaring a trust interest for itself in the property in contravention of the owner's vested rights.

The neutral principles standard should not, and cannot, be viewed as an open-ended invitation to courts to peruse and weigh, as they deem fit, church

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[2] In their Petition for Writ of Certiorari ("Petition"), Petitioners detail the various decisions reached by state courts as to which standards they will, and/or believe to be constitutionally compelled to, apply in church property disputes. (Petition at 25-35.)

canons, constitutions, and other doctrinal documents in church property disputes. In order to avoid such unconstitutional forays into ecclesiastical issues, courts should first consider only secular documents, such as trusts, deeds, and statutes. Only if those secular documents are unclear should courts consider ecclesiastical documents, even when such documents contain provisions governing the use of church property.

This case presents a paradigm of the very sort of religious quagmire that the Religion Clauses were designed to shield from even the perception of government involvement, entanglement, or preference. An exercise of religious freedom – St. James Parish's disaffiliation from the Episcopal Church due to a doctrinal dispute – spawned this property dispute. The question is whether the local church will lose its vested property rights under circumstances in which a non-religious voluntary association could not lose its rights.

Significantly, the underlying doctrinal dispute has, at its core, the most divisive of political issues, particularly in California, where the citizens of California recently overturned a decision of the California Supreme Court in a highly polarizing, narrowly adopted state referendum. Failure to apply generally applicable principles of property law to such a religiously charged dispute: causes the government to take sides in a religious dispute; has a chilling effect on the free exercise of religion of members of certain denominations; lends state aid to hierarchical churches; violates the command of government neutrality; negates secular law by rubber-stamping ecclesiastical fiat; and fosters religiously based social

divisiveness. St. James Parish has the right to the equal protection and neutral application of generally applicable secular law, and the holding below must now be reviewed and reversed in order to protect that right.

ARGUMENT

I. The Church Property Dispute Cases

In *Watson*, this Court formulated the hierarchical deference rule for judicial resolution of church property disputes, grouping church property rights into three categories and holding that: (1) express language in the instrument by which church property is held would be judicially enforced; (2) in cases of a schism in a congregational church, the congregation's decision concerning property rights would be judicially enforced; and (3) in cases of a schism in a hierarchical church:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church [adjudicatory tribunals] to which the matter has been carried, the legal tribunals must accept such decisions as final . . . and as binding on them. . . .

Id. at 727. In *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952), the Court "converted the principle of *Watson* . . . into a constitutional rule." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440, 447 (1969).

Hull involved a property dispute arising from a schism in a member church of the Presbyterian Church in the United States ("PCUS"). The Georgia Supreme Court, in affirming a decision awarding the property to the local church as represented by the majority faction which had voted to withdraw the church from PCUS, held that PCUS's departure from its doctrine could terminate its implied trust in the local property notwithstanding PCUS's claim of ownership. *See Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 68, 159 S.E.2d 690, 695 (1968). This Court reversed, holding that:

> [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion – the interpretation of . . . doctrines and [their] importance . . . to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Hull, 393 U.S. at 450. However, this Court clarified that, "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment . . . there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* at 447, 449.

In *Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970) (*per curiam*), the Court sanctioned the examination of deeds, corporation charters, state statutes, and provisions of a church's

constitution pertinent to the ownership and control of church property to resolve a church property dispute.

In *Milivojevich,* the Court held that:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over those matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 724-25. Justice Rehnquist's dissent, joined by Justice Stevens, rejected the notion that *Watson* represents a constitutional rule and explained:

> To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding . . . free exercise [clause] problems . . . create far more serious problems under the Establishment Clause.

Id. at 734 (Rehnquist, J., dissenting). Pointing out that, "the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious . . . sect," *id.* at 733, the dissent warned:

> If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, it can easily be converted into handmaidens of arbitrary lawlessness.

Id. at 727.

Jones v. Wolf, 241 Ga. 208, 243 S.E. 2d 860 (1978), involved a church property dispute between two factions of a PCUS church. The Georgia Supreme Court affirmed the lower court's ruling awarding local church property to the majority faction which had voted to withdraw the church from PCUS, notwithstanding the judgment of a PCUS organ that the minority faction constituted the church's congregation. *See* 241 Ga. at 210, 243 S.E.2d at 862.

In *Jones*, this Court approved the Georgia Supreme Court's approach of applying neutral principles by examining deeds to church property, statutory sources, and provisions of the church's constitution concerning the ownership and control of church property. Endorsing the neutral principles approach, the Court explained:

> [T]he method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice....Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious party will

> determine the ownership in the event of a schism or doctrinal controversy.

Jones 443 U.S. at 603. The Court further recognized that it is "the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Id.* at 603, n.3 (quoting *Watson,* 80 U.S. at 722-23).

In 1979, in response to *Jones*, the Episcopal Church adopted Canon I.7.4 ("the Dennis Canon"), which provides that:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

In the years following *Jones*, courts have reviewed the meaning and effect of the Dennis Canon on church property disputes, and as noted below, they have reached conflicting determinations.

A crucial distinction exists between religious disputes, the outcomes of which determine property interests, and property disputes merely involving religious factions. *See Milivojevich*, 426 U.S. 709 (finding that, where the control of the property was

determined by the religious dispute over a defrockment, "this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals"). The Court has applied *Watson* to reverse judgments which have grappled with ecclesiastical questions – hence the results in *Kedroff* and *Milivojevich* (and the striking down of the departure-from-doctrine element in *Hull).* However, when confronted with the property disputes involving religious factions in *Hull*, *Sharpsburg*, and *Jones*, the Court reacted with the neutral principles of law approach.

While *Jones* endorsed the neutral principles of law approach, given that courts subsequently have read it to endorse some deference to certain hierarchical church documents, even when those documents relate solely to secular property issues, it has failed to bring appropriate clarity to this area of the law. Courts have varied widely in their application of that standard. An illustrative example can be found in comparing *Beaver-Butler* and *St. James the Less*, two cases in which the Pennsylvania Supreme Court reached remarkably different results based upon reviews of very similar factors under a neutral principles approach. *Beaver-Butler* involved a property dispute between the PCUS and members of a local church that had disaffiliated from the PCUS. In determining whether the PCUS had a trust interest in the property of the local church, the court approved of, and applied, a neutral principles of law approach. *See Beaver-Butler*, 507 Pa. at 266, 489 A.2d at 1323. Upon review of the deeds, local church charter provisions, and PCUS constitutional provisions, including its amendment unilaterally creating a trust interest for itself in the property of its

affiliated churches, the court ultimately ruled in favor of the local church, finding that there was "no evidence that [the local church] ever intended to convey [its] property interest to [PCUS]," which is an essential requirement for a valid trust under secular trust law. 507 Pa. at 269, 489 A.2d at 1325.

St. James the Less involved a similar property dispute between a local Episcopal church and the diocese, which dispute arose in the wake of the local church's disaffiliation from the Episcopal Church. As in *Beaver-Butler*, the *St. James the Less* court applied a neutral principles of law standard in determining whether the Episcopal Church had a trust interest in the property that was titled to the local church. However, despite considering deeds, local church charter provisions, and national church constitutional provisions that were similar to those reviewed by the court in *Beaver-Butler*, the court reached the opposite conclusion – that there was sufficient evidence to conclude that the local church *had* intended to place its property in trust for the diocese. *See St. James the Less*, 585 Pa. at 452, 888 A.2d at 809. In her dissenting opinion, in which she concluded that, "I am unable to accept [the majority's] determination that [the] property is subject to a trust interest in favor of the Diocese," Justice Newman noted the inconsistency of the majority's opinion with both: (1) the approach the court had previously taken in *Beaver-Butler*; and (2) the well-settled principles of Pennsylvania trust law, which are properly focused upon the intent of the settlor – not the beneficiary. 585 Pa. at 459, 888 A.2d at 814 (Newman, J., dissenting).

Clearly, this level of confusion and/or inconsistency within the same court – let alone amongst courts

around the country – evidences the need for this Court to further expound upon the neutral principles of law approach.

II. Some Guiding Principles of the Religion Clauses

Doctrine under the Religion Clauses has evolved considerably since the church property dispute cases were decided. The Court's Free Exercise Clause cases have moved from the compelling state interest purpose or effect test analysis of *Sherbert v. Verner,* 374 U.S. 398 (1963), to the purpose driven test of *Employment Division v. Smith*, 494 U.S. 872 (2005). This Court's understanding of the Establishment Clause has been on a trajectory from a wall of separation concept to one of non-preferentialism and a correlative avoidance of entanglement that pragmatically would spawn social divisiveness.

In *Employment Division*, the Court held that religious institutions are required to conform their conduct to generally applicable laws unless the government's motive or intent is to impede religion. The Court, citing the church property dispute cases, observed that under the First Amendment, the government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division*, 494 U.S. at 877. The Court explained that neutral laws of general applicability are binding irrespective of religious beliefs: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79.

To permit religious doctrine to be superior to the otherwise applicable law of the land would "in effect permit every citizen to become a law unto himself." *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1978)); *see also United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Free Exercise Clause does not relieve religious adherent of obligation to comply with "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)") (Stevens, J., concurring).

A fundamental principle underlying both of the Religion Clauses is the concept of government neutrality. *See McCreary County, Ky. v. ACLU*, 545 U.S. 844, 875-76 (2005). This principle is especially salient in deciding controversies arising out of disputes between religious organizations and their members. Significantly, government neutrality is as much a question of perception as one of fact. The interrelated concept of "equal treatment" has also been a unifying thread in Religion Clause cases: "the Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part).

Moreover, government actions which are reasonably viewed as favoring a particular form of religion foster a divisiveness in contravention of the Religion Clauses. *See Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J. concurring) ("[The Religion

Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike").

III. The Religion Clauses Require Church Property Rights to be Governed Solely by Generally Applicable Property Law

In the case below, the California Supreme Court, purportedly applying neutral principles of law under *Jones* to resolve a church property dispute, instead applied a hierarchical deference standard, pursuant to which it allowed a self-serving internal church rule (the Dennis Canon) and a state statute (Section 9142 of the California Corporations Code) to confer a special power on certain types of religious organizations to divest associated members of their vested property rights. As detailed below, this result raises many constitutional concerns that warrant this Court's attention and action.

In this case, it was an exercise of religious freedom – the disaffiliation of a parish from a general church for doctrinal reasons – that spawned this church property dispute. The question is whether the parish will lose vested property rights as a result of its exercise of religious freedom under circumstances in which a non-religious organization would not, and could not, be divested of its rights. To permit the state in this case to favor the general church by conferring upon it unique powers to declare a trust interest for its own benefit on property of an affiliated member: lends state aid to the establishment of hierarchical churches; violates the command of government neutrality under the Establishment Clause; interferes with the free exercise of religion of the members of such

denominations; and would foster religiously based social divisiveness.

The court below lent the power of the state to a church hierarchy by effectuating a state statute providing an express exception from generally applicable property law to enforce "the governing instruments of a superior religious body or general church . . . ." California Corporations Code § 9142(c). A more direct attempt to aid and strengthen a religious hierarchy would be difficult to imagine. Excusing the church from "compliance with . . . otherwise valid [property] law" permits the governing religious body to "become a law unto [itself]." *Employment Division*, 494 U.S. at 879. Moreover, judicial enforcement of the statute makes available "the coercive power of civil courts to rubber-stamp" the Dennis Canon, when such deference is not accorded similar acts of secular voluntary organizations. *Milivojevich*, 426 U.S. at 734 (Rehnquist, J., dissenting). While "one's religion ought not affect one's legal rights," *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part), in California, one's religion not only affects one's property rights, it determines them by ecclesiastical fiat.

Moreover, the California Supreme Court's interpretation of Section 9142 sanctioned the very judicial action that this Court has prohibited as unconstitutional. More specifically, under the California Supreme Court's interpretation of Section 9142, a court must first determine whether a religious organization is a "superior religious body or general church." California Corporations Code at § 9142(c)(2). If the court determines that the organization is "superior" or "general," it will then defer to that

organization's "governing instruments" regarding the secular issue of property ownership. *Id.* Where, as here, the hierarchy of the church is disputed, such judicial involvement in determining the structural nature of religious entities has long been condemned as requiring "a searching and therefore impermissible inquiry into church polity." *Jones*, 443 U.S. at 605 (quoting *Milivojevich*, 426 U.S. at 723); *see also Sharpsburg*, 396 U.S. at 369 (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment").

With further regard to this issue, categorizing churches as "congregational" or "hierarchical" with respect to property matters only confuses the analysis. The hierarchical deference standard is often chimerical because many denominations, like the Episcopal Church, are hybrid organizations, bearing both congregational and hierarchical characteristics. Such hybrid organizations often require civil courts to make complex ecclesiological and theological judgments on intra-denominational organization, which are constitutionally forbidden. *See id.*

The California Supreme Court clearly allowed the Episcopal Church's self-serving Dennis Canon to trump the neutral principles of law that it was purportedly applying. "No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner." *Episcopal Church Cases*, 45 Cal.4th 467, 495, 198 P.3d 66, 86 (2009) (Kennard, J., concurring and dissenting). The decision of the court below flies

in the face of "well-established concepts of trust and property law," upon which the neutral principles of law approach is based, *Jones*, 443 U.S. at 603, and which require that a valid trust for real estate must be in writing, signed, and reflect the intention of the settlor (here, St. James Parish) to create a trust. *See* California Probate Code §§ 15201 ("A trust is created only if the settlor properly manifests an intention to create a trust"), 15206 (setting forth the principles of the Statute of Frauds). By validating the Episcopal Church's unilaterally-created trust interest, the decision of the court below failed to "reflect the intentions of the parties," which this Court has recognized as one of the primary benefits of the neutral principles of law approach, *Jones*, 443 U.S. at 603, and it excused certain religious organizations from the generally applicable secular law requiring that property interests be validly recorded.

In conferring upon certain religious organizations this otherwise-unheard-of right to unilaterally create trust interests for themselves in the property titled to others, the California Supreme Court gave preference to those religious organizations over not only other religious organizations, but also secular organizations, in direct contravention of the Establishment Clause and the Equal Protection requirement that the state "govern impartially." *Craig v. Boren,* 429 U.S. 190, 211 (1976) (Stevens, J., concurring); *see also Grumet*, 512 U.S. at 748 (Scalia, J., dissenting) ("the Establishment Clause prohibits the favoring of one religion over others").

The decision below and its hierarchical deference standard further violate the Establishment Clause and the Equal Protection Clause by requiring judicial

deference to decisions of religious hierarchical organizations on secular issues that is not accorded to similar acts of secular voluntary associations. Under the law applicable to secular voluntary associations:

> [A] member of a voluntary association is bound by amendments to the association's rules so long as the amendments (1) are duly enacted; and (2) *do not deprive the member of vested property rights without the member's explicit consent.*

St. James the Less, 585 Pa. 428, 448, 888 A.2d 795, 807-808 (emphasis added). *See generally*, Z. Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harvard Law Review 993 (1930) (outlining the analytic approaches to disputes involving voluntary non-profit organizations).[3]

Had it been properly and neutrally applied to the case at bar, this law would have prohibited the Dennis Canon from depriving St. James Parish of its vested property rights. St. James Parish, a religious corporation, was deeded the property in question in fee

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[3] With respect to secular voluntary associations, the general rule permitting the association to amend its governing charter is "subject to the limitation that the right cannot be exercised in such a way as to work a forfeiture or impairment of rights previously vested in its members." 6 Am. Jur. 2d *Associations and Clubs*, § 9 at 400; 7 C.J.S. *Associations*, § 6 at 33 (By-laws of an association may be amended provided the amendment does not destroy "vested rights"). Many courts have espoused the principle that courts may intervene in the affairs of a private organization only where property rights or pecuniary interest is at stake. *See NAACP v. Golding*, 342 Md. 663, 675, 679 A.2d 554, 560 (1996).

simple absolute, and it is the record title holder. If it had been the intention of the parties for St. James Parish to relinquish the property if it ever disaffiliated with the Episcopal Church, it would have been an easy matter to convey a fee simple determinable, but that was not done.

To that end, the Catholic Church, often considered to be the hierarchical church *par excellence*, in fact not only requires that ownership of goods belongs to that specific juridic person which has legitimately acquired them[4], whether diocese, parish, or other public juridic person, but also mandates[5] that civil law implementation of such ownership be effected.[6] Consequently, if denominations want to maintain control over local church property, they can do so in the manner of all other entities, secular and religious, including the Catholic Church, by creating documents

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[4] c. 1256 of *Corpus iuris canonici* ("*CIC* 1983") as promulgated by Pope John Paul II in the Apostolic Constitution *Sacræ disciplinæ leges*. *See Acta Apotolicæ Sedis* 75/II [1983] VII-XIV, providing (in translation from the Latin): "Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridic person which has acquired them legitimately."

[5] c. 22 of *CIC* 1983: "Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise."

[6] c. 1290 of *CIC* 1983: "The general and particular provisions which the civil law in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church unless the provisions are contrary to divine law or canon law provides otherwise, and without prejudice to the prescript of can. 1547."

that clearly identify their ownership interests, either at the time of purchase or at a later time by agreement with party holding title. Here, the Episcopal Church did not do so. The Episcopal Church has no secular right of reverter, and under generally applicable property and trust law, it could not create one by its own later declaration that St. James Parish was holding the property in trust. St. James Parish is the record title owner of the property; neither courts nor title searchers should be in search of a canonical degree to the contrary.

In addition to the various Establishment Clause and Equal Protection concerns addressed above, the California Supreme Court's decision also raises significant Free Exercise Clause concerns. More specifically, by failing to apply "valid and neutral laws of general applicability," *Employment Division*, 494 U.S. at 879, and by rendering the preferential decision it did, the court below interfered with the deliberate choice of the local congregation to affiliate for ecclesiastical purposes, but not for other purposes, including property ownership. This conclusion is especially warranted where, as here, the local congregation incorporated itself in order to secure its property rights. Furthermore, the decision below inexcusably interfered with the Free Exercise rights of individual members and donors, whose intended gifts to the local incorporated church can now unilaterally be usurped by the national church via ecclesiastical fiat.

The holding below is particularly problematic given the politically charged nature of the doctrinal dispute that led to St. James Parish disaffiliating with the Episcopal Church. The subject matter of the doctrinal

dispute is the elephant in the room. The underlying doctrinal dispute has, at its core, political issues that are among the most divisive in contemporary politics, and particularly divisive in the State of California. The citizens of California just recently overturned a California Supreme Court's decision on gay rights in a highly polarizing, narrowly adopted statewide referendum. A basic principle of the Religion Clauses is to avoid social divisiveness based on religion. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring). In this case, however, the California Supreme Court permits a hierarchical church, because it claims to be a hierarchical church, unilaterally to divest a parish of property after the parish leaves the church in protest over intensely politically charged issues – issues that themselves had been a source of friction between the court and the citizenry of California. Judicial intervention into such a religious-political morass is the very sort of state interference that the Religion Clauses were designed to prevent.

In light of the foregoing serious constitutional concerns raised by the decision below and the inconsistency with which the neutral principles approach has been employed by courts throughout the country, Good Shepherd respectfully submits that it is necessary for this Court to grant the pending Petition and to expound upon the neutral principles approach that it last discussed, and encouraged, thirty years ago in *Jones*. This case offers this Court the opportunity to continue to strengthen and synthesize its Religious Clause emphases on equal treatment and the neutral application of generally applicable laws.

To that end, Good Shepherd, like Petitioners, urges this Court to consider the neutral principles approach

adopted by the Supreme Court of New Hampshire in *Berthiaume v. McCormack*, 153 N.H. 239, 891 A.2d 539 (2006). In *Berthiaume*, the court adopted a neutral principles approach for the resolution of church property disputes, pursuant to which:

> [W]e will first consider only secular documents such as trusts, deeds, and statutes. Only if these documents leave it unclear which party should prevail will we consider religious documents, such as church constitutions and by-laws, *even when such documents contain provisions governing the use or disposal of church property.*

153 N.H. at 248, 891 A.2d at 547 (emphasis added). Not only does such a neutral principles approach protect against unconstitutional court entanglements in doctrinal and ecclesiological issues, but it also comports with well-established generally applicable secular law governing property disputes, which provides that courts may consider extrinsic evidence to determine the parties' intent "only if the language of the relevant documents contains either patent or latent ambiguity." *Id.*

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 08-1579

In the

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF SAINT JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, ET AL.

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF OF THE PRESBYTERIAN LAY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the California Supreme Court violated the First Amendment's Establishment and Free Exercise clauses by interpreting a state statute to confer a special power on certain religious denominations to create trusts for their own benefit in the real property of affiliated local church corporations, solely by declaring that they have unilaterally enacted a post-hoc internal rule, when no other person or entity has such power under state law?

II. Whether this Court's refereeing in *Jones v. Wolf*, 443 U.S. 595 (1979), to denominational canons and constitutions as potential sources of neutral principles of property law can be read, consistently with the First Amendment, as trumping other secular laws governing property rights?

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INTEREST OF *AMICUS CURIAE*[1]

The Presbyterian Lay Committee respectfully submits the accompanying brief as *amicus curiae* in support of petition for writ of certiorari. The petition was filed on June 24, 2009, and placed on the docket on June 25, 2009. Accordingly, this application is timely under Rule 37 of this Court's Rules.

Established in 1965, the Presbyterian Lay Committee ("Lay Committee" or "PLC") is a non-profit corporation whose mission includes informing Presbyterians about issues facing the denomination and equipping local congregations—and their members—in their interaction with the regional and national entities within the Presbyterian Church (United States of America) ("PC(USA)"). The Lay Committee regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding disaffiliation and related property-ownership issues: "A Guide to Church Property Law: Theological, Constitutional and Practical Considerations." The Presbyterian Lay Committee is composed of Presbyterian Church members who are concerned with how the property that is purchased with our money is used. As an

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[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the Presbyterian Lay Committee and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Not less than ten days prior to the due date, the Presbyterian Lay Committee provided counsel of record for all parties with notice of its intent to file this brief.

entity that helps equip lay leaders to maintain the integrity of the Presbyterian denomination, the Lay Committee has a strong interest in this matter.

In the wake of this Court's decision in *Jones v. Wolf*, 443 U.S. 595 (1979), the General Assembly of the PC(USA) unilaterally attempted to assert a trust in its favor over local congregational property, even though legal title to local Presbyterian church property is virtually always held by the local church—and in the name of the local church—alone. Those local churches never assented to the would-be trust. Few, if any, formal property transfers followed in the wake of the General Assembly's unilateral actions. The Lay Committee holds that this unilateral assertion of a trust is inconsistent with the denomination's historical structure of governance. That well-established structure respects the autonomous property ownership and management of and by the local congregations. Unilateral attempts to superimpose a trust on local church property improperly impairs the rights and interests of local congregants, and touches on the abilities of local church fiduciaries to manage and protect church assets according to the considered judgment of local church members.

The United States Constitution forbids preferential treatment of assertions of power by ecclesiastical entities in civil courts resolving purely civil disputes over such matters as title to local church property. Accordingly, title to property held by a local religious corporation should be evaluated in the same manner as property held by any other legal entity. An assertion of a trust by a self-described trust beneficiary cannot properly be

enforced under trust law principles applicable to every other person in civil society. That preferentially idiosyncratic rule should not be enforced merely because the self-described beneficiary occupies, for some purposes, a higher tier in a religious community. Correct enunciation of these principles by this Court will help preserve the basic legal expectations of Presbyterian—and other—congregations throughout the United States. Accordingly PLC respectfully submits its views on the constitutional analysis properly applicable to church property disputes and the ramifications of the competing analyses offered to the bedrock religious freedoms of millions of American Christians.

REASONS FOR GRANTING THE PETITION

The issues raised by this closely-watched case are of utmost importance to the relationship between religious freedom and the judicial function. The religious demographics of the United States have changed dramatically over the last generation. The upshot is this: the principle of hierarchical deference handed down in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and criticized—but allowed—in *Jones v. Wolf*, 443 U.S. 595 (1979), is no longer constitutionally viable. Some courts explicitly adopt a hierarchical-deference approach, stating that they will defer to the decisions of church hierarchies in all church disputes; other courts, such as the California Supreme Court in the present case, adopt a neutral-principles approach in name only, enforcing documents unilaterally adopted by church hierarchies declaring themselves the beneficiaries of congregational property trusts. The decision of the

California Supreme Court at issue here, claiming to apply neutral principles but in fact applying hierarchical deference, has exacerbated the deepening federal constitutional issues. Confusion abounds, and litigation has exploded. The time is ripe for this Court to reexamine the constitutionally-sensitive principles that govern church property disputes.

I. The Litigation-Triggering Changes In The Nation's Religious Composition Since *Watson v. Jones* And *Jones v. Wolf* Call For Reexamination Of The Hierarchical-Deference Rule.

Religion is deeply rooted in our nation's history and tradition; it is also profoundly significant to—and inseparable from—the beliefs and practices of many citizens across the entire country. Studies show that approximately eighty percent of Americans consider themselves religious.[2] That formidable percentage translates into the practical reality that religion directly touches the lives of approximately 245 million Americans.[3]

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2 Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey 3 (Mar. 2009), *available at* http://www.Americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf; *see also* Pew Forum on Religion & Public Life, U.S. Religious Landscape Survey 5 (Feb. 2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

3 U.S. Census Bureau, http://www.census.gov (the population estimate is calculated from the July 6, 2009, population count of 306,850,212 people).

Not only are the American people overwhelmingly religious in their worldview, they are an astonishingly divided community of believers in the transcendent. According to a study by the Pew Forum on Religion & Public Life, the United States is among the most religiously diverse countries in the world. The nation boasts approximately twelve major religious groups, as well as literally hundreds of independent sects and small denominations. Pew Forum, *supra* note 2, at 10. With numerous communities of faith have come deep internal divisions and intra-church strife. These disagreements have led to schisms, realignments, and the formation of new religious communities.[4]

This has been particularly true in the Protestant communities of faith, where the locus of control is not always fixed. Unlike the Roman Catholic Church, or the Church of Jesus Christ of Latter-Day Saints, where property is typically held by a superior body, many mainline Protestant communities allow their congregations to hold title to their property. Jeff Hassler, Comment, *A Multitude of Sins? Constitutional Standards for Legal Resolution of Church Property Disputes in a Time of Escalating Intradenominational Strife*, 35 Pepp. L. Rev. 399, 405-06, 436 (2008). Internecine disagreements within various Protestant communities of faith have often led to property disputes that find their way into

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[4] Cathy Lynn Grossman, *Most Religious Groups in USA Have Lost Ground, Survey Finds*, USA TODAY, Mar. 9, 2009, *available at* http://www.usatoday.com/news/religion/2009-03-09-american-religion-ARIS_N.htm ("Nearly 2.8 million people now identify with dozens of new religious movements....").

secular courts. These disputes have occurred with rapidly increasing frequency in recent years.[5]

Aside from increased litigation due to internal church divisions, immigration has significantly altered the nation's religious composition.[6] Indeed, the country's religious composition is obviously different—and much more diverse—than in 1871 when *Watson* was decided. The issues presented are entirely ripe—and increasingly pressing—for the Court's resolution.

II. Due To Substantial Changes In The Nation's Religious Makeup, Hierarchical Deference Has Become Practically Unworkable And Constitutionally Problematic.

A. Hierarchical Deference Entangles The Courts In Religious Doctrinal Disputes.

When this Court first articulated the principle of hierarchical deference in *Watson*, most church structures fitted neatly into two categories: hierarchical or congregational. That bipolar classification no longer captures the reality of America's vibrantly diverse religious groups. For

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5 A Westlaw search for all state and federal cases discussing "church property" reveals the following figures (appeals are counted separately); from 1950 to 1959, there were approximately 332 cases; from 1960-1969, 343 cases; from 1970-1979, 387 cases; from 1980-1989, 486 cases; from 1990-1999, 569 cases; from 2000-2009, 806 cases. (This search was done Jul. 24, 2009, in the "Allcases" database; hence, the numbers for 2009 are not fully comprehensive).

6 Kosmin & Keysar, *supra* note 2, at "Highlights."

example, among the Christian denominations in the United States today, a host of different organizational structures exist that combine both hierarchical and congregational principles. *See* Hassler, 35 Pepp. L. Rev. at 405-07. In light of that structural reality, some courts have determined that churches can be hierarchical for matters of doctrine and practice, but congregational for purposes of controlling property. *See Kelley v. Riverside Blvd. Indep. Church of God*, 358 N.E.2d 696, 704 (Ill. App. Ct. 1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 241 A.2d 691, 703 (Md. 1968), *vacated and remanded*, 393 U.S. 528 (1969), *aff'd*, 254 A.2d 162, *appeal dismissed*, 396 U.S. 367 (1970); *Smith v. Church of God*, 326 F. Supp. 6, 12 (D. Md. 1971); *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen*, 256 N.E.2d 212, 217 (Ohio 1970), *cert. denied*, 400 U.S. 827 (1970); *Dragelevich v. Rajsich*, 263 N.E.2d 778, 781 (Ohio Ct. App. 1970).

Over the years, courts have confronted significant difficulties when called upon to classify many faith communities into the bipolar categories of hierarchical or congregational. For example, there is a dispute as to the claimed hierarchical nature of the PC(USA). In particular, as the Presbyterian polity shows, a denomination may have one or more successive bodies with some responsibility for doctrinal consistency over geographic areas encompassing many local congregations, without having authority over economic matters such as property ownership. That an organization may have multiple tiers does not mean that its local congregations are subject to comprehensive hierarchical governance. The classification

difficulties do not end there. Courts have even had to handle cases involving churches with *no* organized form of government. *See Rosicrucian Fellowship v. Rosicrucian Fellowship Nonsectarian Church*, 245 P.2d 481 (Cal. 1952). Consider, too, the case of *Concord Christian Center v. Open Bible Standard Churches*, 34 Cal. Rptr. 3d 412, 423 (Ct. App. 2005), where the parties themselves disagreed over whether the church was congregational or hierarchical; indeed, substantial evidence by both parties pointed toward the validity of each of their respective arguments. *See also Master v. Second Parish of Portland*, 124 F.2d 622 (1st Cir. 1941) (Presbyterian church merged with local congregational church); *Malanchuk v. Saint Mary's Greek Catholic Church of McKees Rocks*, 9 A.2d 350 (Pa. 1939) (local congregation composed of merged congregations from denominations with different governing structures); *Singh v. Singh*, 9 Cal. Rptr. 3d 4 (Ct. App. 2004) (two competing boards in a Sikh Temple, one claiming to be appointed for life, and the other claiming their appointment was for a term only); *Clough v. Wilson*, 368 A.2d 231 (Conn. 1976) (congregation had ambiguous level of loyalty to Plymouth Brethren church leader in England).

Cases such as these, where the locus of control is ambiguous, have beguiled courts into adjudicating questions of religious polity in violation of bedrock First Amendment principles. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 (1976). That constitutional infirmity lies at the heart of the *Watson-Wolf* hierarchical-deference test. The base inquiry under that test is whether the church is in fact hierarchical. But that inquiry can become a snare. "For every Christian church and probably

every religious organization, forms of government relate to doctrine.... In religious institutions, government is not independent of belief; rather, it reflects an understanding of how God relates to human beings and how human beings seek religious truth." Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 Colum. L. Rev. 1843, 1877 (1998); *see also* Kathleen E. Reeder, *Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits*, 40 Colum. J.L. & Soc. Probs. 125, 130 (Winter 2006).

Not only is the hierarchical *vel non* inquiry fraught with inherent constitutional difficulty, judges are profoundly ill-equipped institutionally to make the ultimate theological judgment whether a church is hierarchical. The problem is further compounded when precedent has been set by a court with one denominational polity before it, and subsequent lower courts improperly apply that ruling to litigants of another denomination. Any court ruling which factors in polity risks imposing that interpretation into other denomination's internal relationships. In the case for which review is now sought, it is clear that California's interpretation of an Episcopal property dispute is worded in a manner broad enough to blanket other purportedly hierarchical denominations.

This problem is apparent from the many inconsistent rulings that dot the judicial landscape. For example, Baptist churches have generally been found to be congregational in nature, *Greenawalt*, 98 Colum. L. Rev. at 1878, yet one modern court classified a Baptist church as hierarchical, *Crumbley v. Solomon*, 254 S.E.2d 330 (Ga. 1979); *see also*

Chrapko v. Kobasa, 114 A. 254 (Pa. 1921) (holding that the Greek Catholic Church was connected with the Roman Catholic Church, despite evidence that the church was independently organized); *Drozda v. Bassos*, 23 N.Y.S.2d 544 (App. Div. 1940) (holding Greek Catholic Church to be an independent congregation, not united with the Roman Catholic Church, despite testimony indicating association); *compare Mullins v. Elswick*, 438 S.W.2d 496 (Ky. 1968) (holding Free Will Baptist church is congregational because its governing power rests with members of the congregation), *with W. Conference of Original Free Will Baptists of N.C. v. Miles*, 129 S.E.2d 600 (N.C. 1963) (upholding a jury determination that a relationship between the local church and a Conference appointed to decide matters of doctrine was enough to show Free Will Baptist churches have a hierarchical structure); *compare Kemp v. Lentz*, 68 N.E.2d 339 (Ohio Ct. App. 1943) (holding Church of the Brethren is congregational, and that sending delegates to national conventions and giving money to parent church does not mean it is hierarchical), *with First Church of Brethren v. Snider*, 79 A.2d 422 (Pa. 1951) (holding Church of the Brethren to be hierarchical because its affiliation with General Conference and all ministers were duly ordained ministers of the Church of the Brethren); *compare Hayman v. St. Martin's Evangelical Lutheran Church*, 176 A.2d 772 (Md. 1962) (local church affiliated with Evangelical and Reformed Church through merger, but still held to be congregational), *with Immanuel Evangelical Lutheran Church v. Fromm*, 116 N.W.2d 766 (Mich. 1962) (holding church to be hierarchical because it "conducted business" as a part of the Evangelical and

Reformed Church). As this illustrative recitation shows, courts find themselves reaching wildly inconsistent results in searching for a sort of jurisprudential Holy Grail. That should not be.

Assuming a church is correctly found to be hierarchical in nature, sensitive problems still emerge. For example, in the litigation at hand, the Episcopal Church claims to be the pinnacle of the hierarchy, yet it in turn is part of the worldwide Anglican Communion. The Primates of the Anglican Church have repeatedly encouraged the Episcopal Church to suspend this litigation, but to no avail.[7] So, to which hierarchy should the courts defer? Should the Archbishop of Canterbury's guidance for litigation-avoidance trump the litigiousness of the American church's current decision-makers? The current—and related—jurisprudence is woefully unclear.

In happy contrast, the neutral-principles approach "obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes." *Jones*, 443 U.S. at 605. In *Jones*, this Court permitted (but did not require) courts to apply the neutral-principles test and expressly noted the numerous advantages of that inquiry. But that was a generation ago. The intervening history over the past thirty years has demonstrated not only the practical advantages of

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7 American Anglican Council, Equipping The Saints: An Educational Resource Produced by The American Anglican Council, 8 (3d ed. March 2009), http://www.americananglican.org/assets/Resources/Equipping-the-saints/Equipping-the-Saints-3AAC.pdf.

neutral principles, but has illuminated as well the constitutional mischief inherent in the hierarchical-deference methodology. A church property rule designed for nineteenth-century, more homogeneous America does not address the constitutional realities posed by religiously diverse twenty-first century America.

B. The Hierarchical-Deference Approach, Whether Adopted Explicitly Or Through State Statutes That Allow The Formation of Unilateral Trusts Over Church Property, Creates Both Unequal Treatment And Preferential Rulings.

The constitutional incoherence of the hierarchical-deference rule, whether adopted explicitly or through deference to unilateral denominational claims to beneficiary status, is manifest. Professor Kurt Greenawalt rightly noted that hierarchical deference "contains an anomaly that is so evidently impossible to justify, it will almost certainly not survive. The anomaly is the different treatment accorded congregational and hierarchical churches once their polity is determined." *Greenawalt*, 98 Colum. L. Rev. at 1866. This gaping inequality has not gone unnoticed in the judicial literature. As the Supreme Court of Kentucky observed in *Bjorkman v. Protestant Episcopal Church in the United States of America of Diocese of Lexington*, 759 S.W.2d. 583, 586 (Ky. 1988): "[I]n every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization." That is surely overbroad—and profoundly wrong. Even in a

situation where members of a local congregation both purchased and maintained property *entirely* with their own tithes, offerings, and other resources, then decided by unanimous vote to separate, the local congregation would lose its property to the general church solely because of its denominational affiliation—and an affiliation frequently created in the distant past. It is difficult in the extreme to identify any parallel in American law.

Equally important, it is peculiarly the members of hierarchical churches who will suffer from this legally-imposed structural inequality. Under the neutral-principles approach,

> [b]ecause congregational churches and their members are dealt with by civil courts on the same terms as secular voluntary associations, aggrieved members may seek civil court protection of certain common-law rights in their relations with the church. Under the hierarchical-deference standard, members of hierarchical or semi-hierarchical congregations, on the other hand, may be deprived of all such rights as long as the denomination determines they should be. Hassler, 35 Pepp. L. Rev. at 428-29 (citation omitted).

This starkly unequal treatment spawns profound constitutional tensions by granting preferential treatment—in civil courts—to some citizens over others. *See* Arlin M. Adams & William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1294-95 (1980). That should not be.

In addition, the hierarchical-deference approach confers litigation advantages on religious bodies that are not equally afforded to nonreligious associations. As then-Justice Rehnquist, joined by Justice Stevens, stated in dissent in *Serbian Eastern Orthodox*: "To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would create far more serious problems under the Establishment Clause." *Serbian Eastern Orthodox*, 426 U.S. at 734 (Rehnquist, J., dissenting).

In happy contrast to the hierarchical-deference approach, neutral-principles analysis applies the same standards to all religious and non-religious associations. The upshot is this: the latter approach avoids tipping the scales in favor of one litigant over another.

C. Continuing Use Of Hierarchical Deference Has The Potential For Lawlessness And Unfairness.

As (the late-Chief) Justice Rehnquist emphasized in his Serbian Eastern Orthodox dissent, "If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness." *Serbian Eastern Orthodox*, 426 U.S. at 727 (Rehnquist, J., dissenting). In recent decades, bewildering arrays of religious movements have exercised considerable control over their members. Quite apart from the occasional madness of a suicide pact, a hierarchical attempt to take all congregational property through imposition of a

unilateral trust—and to enforce it through the hierarchical-principles theory—is not unlike the actions of some of the new religious movements which unceremoniously appropriate the assets of their members. Our submission in this respect is straightforward: church hierarchies should not be exempt from the normal rules governing the creation and recordation of property interests.

D. The Neutral-Principles Approach Both Embodies Sound Constitutional Principles And Is Highly Practicable In Its Operation.

The neutral-principles approach, as its name suggests, levels the litigation playing field in an admirably practical way. That achieves a vitally important constitutional value. As this Court stated in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 715 (1994), "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Neutral-principles analysis avoids these constitutional difficulties and works to ensure fairness for all parties.

This Court noted in *Jones* that "the primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." *Jones*, 443 U.S. at 603. For example, in denominations that are hierarchical for both theological and property purposes, such as the Roman Catholic Church, the potential for property disputes has largely been pretermitted by the vesting of title in the Bishop. *See Hassler*, 35 Pepp. L. Rev. at 405-06. That centralizing, dispute-avoidance tack

is also employed by the Church of Jesus Christ of Latter-Day Saints. *See id.* at 436. These churches would maintain current ownership structures under neutral principles by either holding title or using "appropriate reversionary clauses and trust provisions." *Jones*, 443 U.S. at 603. At the other extreme, a clearly congregational denomination, such as Baptist churches, would continue to have disputes resolved as they have been in the past. All denominations would retain the prerogative through ordinary legal means to determine where property will end up in the event of a split. *Id.* at 603-04.

III. California Corporations Code Section 9142 As Interpreted By The California Supreme Court Establishes Hierarchical Deference And Violates The First Amendment.

The ruling of the California Supreme Court is profoundly flawed. By its decision, our most populous state's highest court has crossed a jurisprudential line that threatens religious freedom. This Court has often stated that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *see also Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952).[8] The California Supreme Court's interpretation of California Corporations Code Section 9142 ("Section

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[8] We recognize fully that *Epperson's* broad statement does not reflect the views of some Members of the Court, but this robust neutrality requirement has loomed large in modern First Amendment jurisprudence.

9142") runs afoul of both of these well-established principles. The statute discriminates between different religious sects and small denominations by favoring hierarchical church structures without a narrowly-tailored means of fostering a compelling interest. Further, it violates the Establishment Clause by advancing religion over nonreligion through an unconstitutional delegation of state power to churches.

A. California Corporations Code Section 9142 Unconstitutionally Advantages Hierarchical Denominations At The Expense Of Congregational Denominations.

As interpreted by the California Supreme Court, Section 9142 inappropriately advantages hierarchical religions over congregational faith communities. It does so by granting only hierarchical institutions the unilateral power to assert trusts over parish properties without the consent of the titleholder. Cal. Corp. Code § 9142(c)(2) (West 2009). In *Larson v. Valente*, this Court held that where a law violates the neutrality principle by discriminating among denominations, it becomes "suspect" and therefore subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 246 (1982); *see also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The test for strict scrutiny requires that there exist a compelling governmental interest to justify the discrimination, and that the law in question be narrowly tailored to further that interest. *Larson*, 456 U.S. at 247.

In adumbrating the analysis, we assume, *arguendo*, that a powerful governmental interest exists in giving a church the power to rule autonomously, in order to prevent judicial entanglement in ecclesiastical matters. Even so, Section 9142 is not narrowly tailored. The same goal can still be achieved by striking part (c)(2),[9] as this particular provision does nothing more than open the door for hierarchical churches to do what no other religious body can do. As written, this portion of the statute is under-inclusive. However, if it were to include congregational churches, it would *still* violate the Establishment Clause because it would give a benefit to all religions that it does not give to similarly situated nonreligious nonprofit associations. The best way to ensure that Section 9142 is aligned with the ideals of the First Amendment is to strike Section (c)(2).[10]

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[9] Cal. Corp. Code § 9142(c)(2) (West 2009) ("(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies: (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.").

[10] This situation is comparable to those put forth in *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985); and *Larson*, 456 U.S. at 248.

B. California Corporations Code Section 9142 Unconstitutionally Delegates Governmental Decision-Making Authority To Religious Institutions.

Since *Jones*, this Court has consistently held that the government may not delegate decision-making authority to religious institutions. In *Larkin v. Grendel's Den*, 459 U.S. 116, 122 (1982), this Court rejected a state law that gave churches a veto over neighboring applications for liquor licenses, because the law "vest[ed] discretionary governmental powers in religious bodies." Similar to California's Section 9142, the Massachusetts legislature had granted churches a special benefit that it did not grant secular nonprofit organizations. The Court determined that the measure violated the Establishment Clause because it advanced religion by allowing churches to influence government land use regulation. *Id.* at 120.

This is precisely the function of Section 9142's hierarchical deference. It supplants the legislature's well-developed trust law and offers purportedly hierarchical churches—and no other organizations—the power to revoke the property rights of any subordinate parish. Not only does this usurp governmental authority, but it opens the door to the *Larkin* Court's fear that "the churches' power under the statute could be employed for explicitly religious goals." *Id.* at 125. Granting hierarchical religious bodies such untrammeled authority over property rights poses this exact risk, especially when the local churches have not expressly yielded such authority. The power to decide who owns property, a core power of civil government, would be vested in religious

bodies, which can—and will—use that power for their own particularistic purposes, such as to enforce orthodoxy and stifle dissent.

The result in *Larkin* would have been different if the churches' veto power had been included in local covenants, conditions, and restrictions that were voluntarily agreed upon by the surrounding property owners. Under those circumstances, the churches would have enjoyed veto power under neutral principles of contract law. In the same way, a local congregation is free to grant its religious denomination the contractual right to resolve property disputes. Yet, the denomination cannot assume this right without a proper legal instrument executed by the grantor—in this case, the local congregation. Allowing religious organizations to declare unilaterally trusts in their own favor effectively delegates governmental authority to religious institutions, which would then become free to dictate results in a way other parties cannot. This creates a religion-specific framework that binds even entities that have not contractually accepted it. The First Amendment does not allow such a law.

IV. Both Hierarchical Deference And Enforcement Of Unilaterally Adopted Church Property Trust Provisions Are Incongruous With The Expectations Of Congregational Church Donors, Members, And Supporters.

The Free Exercise and Establishment clauses are designed to protect individual liberty. The purpose of anti-establishment structures is to ensure that "We the People" may choose religious affiliations free of governmental influence and coercion.

Similarly, the government may not lawfully interfere with citizens' free exercise rights in order to ensure that people may worship and believe in the manner that they see fit.

For many people, church is fundamentally at the local level. People are connected to the members they attend church with—the people they are baptized, married, and buried among—not the religious hierarchy behind them. In his analysis of the religious expectations of American church members, Professor Greenawalt found that "[m]any Protestants now join a local church that seems suitable, with relatively little concern about the general denomination; they switch denominations freely and, regardless of denomination, may consider the congregational government of the local church as most important." *Greenawalt*, 98 Colum. L. Rev. at 1875. More systematically, a study by the Pew Forum on Religion & Public Life confirms that approximately forty percent of Americans have switched religious allegiance since their childhood. Pew Forum, *supra* note 2, at 5. Thus, it is generally the case that when members donate money, time, or land to their church, they mean for it to support the activities at the local level. When courts operate under standards of hierarchical deference or enforce unilaterally adopted trust provisions, however, those expectations are dashed. Especially in situations like the one at hand, where the congregation voted to leave a denomination by a lopsided vote of 341 to 4 (Pet. Cert. 7); the people donated the land directly to the local congregation (Pet's App. Br. 7); and literally all costs associated with building and maintaining the church property were paid by the very local members who voted to change affiliation (Pet's App.

Br. 9); constitutional freedom demands that the local congregation be allowed to retain its property.

CONCLUSION

For the foregoing reasons, the petition of St. James Anglican should be granted and the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,
Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICI CURIAE* SYNOD OF SOUTHERN CALIFORNIA AND HAWAII, And PRESBYTERY OF HANMI IN SUPPORT OF RESPONDENTS

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THE INTEREST OF THE AMICI CURIAE

I. The Amici Curiae are governing bodies within the Presbyterian Church (U.S.A.).

Amicus Synod of Southern California and Hawaii (the "Synod") is a California non-profit religious corporation organized for the purpose of serving as the civil law structure for the Synod of Southern California and Hawaii, a governing body of the Presbyterian Church (U.S.A.) ("PCUSA").[1] The Synod is a corporate expression of PCUSA consisting of all of the presbyteries within a specific geographic region, with authority over those presbyteries.

Amicus Presbytery of Hanmi also known as Hanmi Presbytery ("Hanmi Presbytery") is a California non-profit religious corporation organized for the purpose of serving as the civil law structure for Hanmi Presbytery, a governing body within PCUSA. Hanmi Presbytery is a corporate expression of PCUSA consisting of all the churches and ministers primarily serving Korean immigrants in Southern California. Hanmi Presbytery is subject to the authority of the Synod.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief, and the parties have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

The Synod and Hanmi Presbytery (collectively, the "PCUSA Parties") filed the only amicus brief before the California Court of Appeal in this matter, and also filed an amicus brief before the California Supreme Court. The PCUSA Parties are also Respondents in a Petition for Writ of Certiorari pending before this Court in the matter entitled *Kim et. al. v. Synod of Southern California and Hawaii, et al.*, case no. 09-01508 (the "*Kim* Matter"). The *Kim* Matter is also a case involving a schismatic local church attempting to disaffiliate from a national denomination and take its property.

II. The resolution of this case directly impacts the ability of the PCUSA Parties to resolve church schisms.

In three seminal cases, this Court has held that from a legal standpoint PCUSA is a hierarchical church. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 726-727 (1871), *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), and *Jones v. Wolf*, 443 U.S. 595 (1979). Respondents are affiliated with the Protestant Episcopal Church in the United States of America, which courts also treat as a hierarchical church.

Like the Respondents, the PCUSA Parties face the challenge of schismatic congregations split on issues of doctrine. The governing documents of the PCUSA Parties address this situation. Under the PCUSA Parties' governing documents, if a presbytery cannot resolve a schism within a local church, then it must determine which faction of the congregation represents the "true church" and is entitled to control the local

church. The PCUSA Parties' governing documents also state that a particular church holds its property in trust for the benefit of PCUSA, and that the trust can only be severed if the particular church's presbytery takes constitutional action to sever the particular church's affiliation.

The resolution of this case directly impacts the ability of all hierarchical churches to resolve schisms within their congregations and, if necessary, to control and possess church property. The *Kim* Matter is one of those cases and presents issues similar to this case's issues to this Court. For these reasons, the PCUSA Parties have a substantial interest in this case and have taken the unusual step of appearing as amici curiae in support of Respondents' Opposition Brief to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The California Supreme Court's decision in this matter did not decide an important question of federal law.[2] To resolve this church property dispute, the California Supreme Court applied the straightforward "neutral principles of law" test that this Court endorsed in *Jones v. Wolf*, 443 U.S. 595 (1979). The California Supreme Court decided this matter under California neutral principles of law by analyzing the

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[2] The PCUSA Parties note that the Petition for Writ of Certiorari could very well be denied on procedural grounds–i.e. the decision is not a final adjudication and the decision does not conflict with the decisions of the highest court of another jurisdiction. The PCUSA Parties, however, will leave it to the Respondents to address those issues and will only address the substance of Petitioners' arguments which affect the PCUSA Parties.

local church's deeds, the local church's governing documents, including the governing documents of the Protestant Episcopal Church in the United States of America (the "Episcopal Church"), and California church property statutes– California Corporations Code § 9142.

Like they did in the courts below, Petitioners urge this Court to adopt an analysis that they invented to resolve church property cases. They call their analysis "pure" neutral principles of law. It is hardly neutral, because their methodology **prohibits** a court from deferring to a hierarchical church's ecclesiastical decisions. A rule prohibiting deference to ecclesiastical decisions would mean that a secular court must ignore a hierarchical church's resolution of a local church's schism. As a result, this so-called "pure" neutral principles analysis violates the First and Fourteenth Amendments to the United States Constitution. Not surprisingly, not a single court in the United States has adopted the so-called "pure" neutral principles of law analysis espoused by Petitioners.

Petitioners also contend that California Corporations Code § 9142 (California's church property statute) is unconstitutional. In essence, Petitioners want courts to decide church property disputes by only looking to the deeds of the property and the local church's governing documents without reference to most denominational constitutions or other governing documents. In making that argument, the Petitioners are really asking the Court to overrule *Jones*, which has served as the bedrock for church property cases for the past thirty years. Implementation of the "pure" neutral principles approach would force hierarchical churches like PCUSA and the Episcopal Church to

radically change their polity or face Balkanization or even extinction. Forcing a hierarchical church to change its polity violates both the Establishment Clause and the Free Exercise Clause of the First Amendment of the United States Constitution.

REASONS TO DENY THE PETITION

I. By prohibiting courts from deferring to ecclesiastical decisions of a hierarchical church's governing bodies, Petitioners' so-called "pure" neutral principles approach violates the First and Fourteenth Amendments.

When resolving a church property case, Petitioners' "pure" neutral principles approach prohibits a court from deferring to an ecclesiastical decision made by a governing body in a hierarchical church. That rule of mandatory non-deference would make it impossible for a hierarchical church to resolve church schisms in accordance with its governing documents. As a result, such a rule would violate the First and Fourteenth Amendments to the United States Constitution.

A. The Episcopal Church is a hierarchical church.

Hierarchical churches are "defined as those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." *Kerdoff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 110 (1952). In a hierarchical church, a local congregation is deemed to

have agreed to be bound by the orders of the national church:

> It has lon_ been established that in such a hierarchical church, an individual local congregation which affiliates with the national church body becomes "a member of a much larger and more important religious organization . . . under its government and control, and . . . bound by its orders and judgments."

Concord Christian Center v. Open Bible Standard Churches, 132 Cal. App.4th 1396, 1409 (2005) (ellipse in orig.), citing *Watson v. Jones*, 80 U.S. (13 Wal.) at pp. 726-727.

Courts treat the Episcopal Church as a hierarchical church. *Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002), see also *Protestant Episcopal Church v. Barker*, 115 Cal.App.3d 599, 611, 171 Cal.Rptr. 541 (1981). PCUSA shares a similar hierarchical system. *Presbyterian Church in the United States v. Hull*, 393 U.S. 440, 441-442 (1969)(PCUSA is a "hierarchical" church, with its churches organized in ascending order from the local church sessions, to the regional presbytery, to its supervising synod, all under the governing General Assembly.)

B. *Jones v. Wolf* requires courts to defer to internal policy decisions of hierarchical churches.

This Court has consistently disagreed with the Petitioners' proposition of no deference to any ecclesiastical determination in church property cases

because the Free Exercise Clause of the First Amendment requires such deference. In fact, this Court has held that a court may have to defer to an ecclesiastical decision made by a hierarchical church to resolve a church property case:

> There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. [fn. omitted] This under our Constitution necessarily follows in order that there may be free exercise of religion.

Kerdoff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 120-121 (1952).

Similarly, when a hierarchical church creates a tribunal to adjudicate disputes over church rules, the First and Fourteenth Amendments to the United States Constitution require secular courts to defer to the tribunal's resolution of the dispute:

> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and **to create tribunals** for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over **the government and direction** of subordinate bodies, the **Constitution requires that civil courts accept their decisions as binding upon them**.

Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-725 (1976) (emphasis added).

Contrary to Petitioners' contention that courts must not defer to ecclesiastical decisions, this Court has held that courts must defer to ecclesiastical decisions made by hierarchical church tribunals.

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court applied the principles of *Watson*, *Kerdoff* and *Serbian Orthodox* to provide a framework for courts to resolve church property disputes. *Jones* involved a dispute within a local church of the Presbyterian Church of the United States. In *Jones*, this Court held that neutral principles of law was a constitutionally permissible method for a court to resolve a church property dispute. *Jones*, 443 U.S. at 604. However, this Court also held that states could also use a rule of **mandatory deference** to religious authority to resolve church property disputes as this Court announced one hundred years earlier in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872). *Jones* 443 U.S. at 608-609. Jones also held that in certain circumstances a court applying a neutral principles of law analysis must defer to ecclesiastical decisions:

> [T]here may be cases where the deed, the corporate charter, or **the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property**. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court **must**

> **defer** to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

Jones, 443 U.S. at 604 (emphasis added).

In *Jones*, the denomination's regional body, the Presbytery, appointed a commission to resolve factional disputes at the Vineville Presbyterian Church, as expressly authorized under the denomination's charter, the Book of Church Order. The case presented issues including what standard of review a civil court should adopt in reviewing challenges to that action. This Court remanded the case back to the Georgia Supreme Court with directions on what were the constitutional limitations on the civil court's authority on that issue. This Court held that, while it would be constitutional for a state to declare its common law to be based on the "neutral principles" model, that model could not be applied to overrule the Presbytery's exclusive authority to determine the "true church" faction within a schismatic church, entitled to the exclusive authority to manage the subject property:

> All this may suggest that the identity of the "Vineville Presbyterian Church" named in the deeds must be determined according to terms of the Book of Church Order, which set out the laws and regulations of churches affiliated with PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine, and to usurp the function of the commission appointed by the Presbytery, which already has determined that

> petitioners represent the "true congregation" of the Vineville church.

Jones, 443 U.S. at 609.

Under PCUSA's governing documents, its governing bodies – i.e. synods and presbyteries – have the discretion to appoint a commission to resolve a church schism and declare which faction is the "true congregation." *Jones* held that when the denomination's leadership, acting pursuant to its internal rules, has already determined which faction of the congregation is its "true representative" or "true church", a secular court cannot overturn that decision. *Id.*

By not giving deference to the decisions of a hierarchical church's governing bodies, Petitioners' so called "pure" neutral principles of law approach eviscerates a hierarchical church's ability to resolve schisms within its local churches in violation of the First and Fourteenth Amendments. *Serbian Orthodox Diocese*, 426 U.S. at 724-725. The approach urged by Petitioners would require this Court to modify or overrule its opinions in *Watson*, *Kerdoff*, *Serbian Orthodox,* and *Jones*. The Petition, therefore, should be denied.

II. The California Supreme Court's interpretation of California Corporations Code § 9142 did not infringe on the Free Exercise and Establishment Clauses.

California Corporations Code § 9142 (c) ("Section 9142 (c)") allows the assets of a religious corporation to

be held in trust if the governing documents of its general church so provide:

> (c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies:
>
> (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust.
>
> (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.
>
> (3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation.

In this case, the California Supreme Court held that Section 9142 "is fully consistent with *Jones v. Wolf* [citation omitted], and promotes the free exercise right of persons to form and join a religious association that is constructed and governed as they choose." *Episcopal Church Cases*, 45 Cal.4th 467, 492 (2009). The California Supreme Court also held that Section 9142 was the special type of state statute to resolve church property disputes that Justice Brennan contemplated in his concurring opinion in *Md. & Va. Churches v. Sharpsburg:* 396 U.S. 367 (1970):

> A third possible approach is the passage of special statues governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies.

Md. & Va. Churches, 396 U.S. at 370. (conc. opn. of Brennan, J.), cited in *Episcopal Church Cases*, 45 Cal.4th at 488.

After determining that Section 9142 (c) did not infringe upon any Constitutional right, the California Supreme Court applied a neutral principles analysis to the facts by analyzing the deeds to the St. James property, St. James's corporate documents, the governing documents of the Episcopal Church (especially, the Dennis Canon) and Section 9142 (c). Based on its analysis, it held that St. James's property is subject to a trust in favor of the Episcopal Church. The result is constitutional and promotes the values embodied in the Establishment and Free Exercise Clauses in the First Amendment to the United States Constitution.

A. Petitioners' Establishment Clause argument fails because it fails to identify the similarly situated groups that Section 9142 (c) purportedly treats differently.

Petitioners argue that Section 9142 (c), through legislative fiat, allows a hierarchical church to create a trust over a local church. Petition p. 12. They argue such a fiat "prefers certain religious organizations over others, in violation of the Establishment Clause."

Petitioners are mistaken. Section 9142 (c) treats all churches that chose to be hierarchical in the same manner.

Section 9142 (c) only affects trusts that are explicitly mentioned in the governing documents of the "superior religious body or the general church", i.e. a national or hierarchical church. Therefore, by its own terms, Section 9142 (c) applies only to "hierarchical" churches, not to congregational churches. So, Section 9142 (c) only allows hierarchical churches to impose a trust over the property of its local churches.

Section 9142 (c) does not favor one hierarchical church over another. Not all instances in which parties are treated differently are suspect. Equal protection does not deny the government the power to treat "different classes of persons in different ways (citation omitted)." *Johnson v. Robison*, 415 U.S. 361 (1974). "Once the plaintiff establishes **governmental classification**, it is necessary to identify a '**similarly situated**' class against which the plaintiff's class can be compared." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1153 (9th Cir. 2007) [emphasis added]. Absent a government classification and similarly situated control group, an equal protection analysis fails.

Petitioners seem to be comparing hierarchical churches with congregational churches. Petition p. 14. However, congregations which are members of a hierarchical denomination and congregations which are members of a congregational denomination are not similarly situated. One congregation is a part of a denomination which declares its members are subject to the authority of the denominational church, and the

other is not. One congregation consists of individuals who chose to join a church that is subject to the authority of the denominational church and the other congregation consists of individuals who chose to join a church that is not subject to the authority of a denominational church. Here the differences in the congregation's choices – and the congregants' choices - regarding the nature of the denomination of which they are a part, or not to be part of a denomination at all, make them not similarly situated. The law respects, not imposes, these choices. Likewise, a hierarchical denomination is not similarly situated to a congregational denomination. One has language in its constitution which recites that its congregations are subordinate to the authority of specified bodies within the denomination (i.e. the diocese and the Episcopal Church) and the other does not. Again, the law simply respects, not imposes, these choices. These self-chosen differences are at least as meaningful as the event size, place and time distinctions relied upon in *Rosenbaum*, 484 F. 3d. at 1153.

Petitioners failed to identify a similarly situated class, so their Equal Protection arguments fail. The Petition, therefore, should be denied.

B. Section 9142 (c) promotes free exercise of religion by accommodating hierarchical churches.

Under the guise of their so-called "pure" neutral principles of law approach, Petitioners contend that Section 9142 (c) as interpreted by the California Supreme Court impinges on local church's free exercise rights because if the local church wishes to disaffiliate from a hierarchical church it cannot take the church

property with it. Once again, in *Jones*, this Court disagreed. In fact, Petitioners' interpretation of Section 9142 (c) violates the Free Exercise rights of congregants who chose to be members of a hierarchical church.

The governing documents of many (but not all) organized denominations declare that the property of their local churches is held in trust for the benefit of the denomination. Section 9142 (c) accommodates that practice, as the California Supreme Court stated in this case:

> Section 9142 [of the Cal. Corporations Code], subdivisions (c), and (d) does not permit state interference in religious doctrine and leaves control of ecclesiastical policy and doctrine to the church. Subdivision (c) of that section permits the governing documents of the general church to create an express trust in church property. . .,

Episcopal Church Cases, 45 Cal.4th at 488.

In *Jones*, this Court approved steps that denominations could take to ensure that "the faction loyal to the hierarchical church will retain the church property" or that the church property will be retained by the "denominational church." *Jones*, 443 U.S. at 606. For this reason, the neutral principles standard cannot be said to "frustrate the free-exercise rights of the members of a religious association." *Id*. *Jones* requires states to provide methods whereby a minority loyal to the general church could establish rights to church property, including through "the corporate charter or constitution of the general church." *Id*. at

607-608. *Jones* requires that hierarchical control of church property, while not "foreordained," must be at least one possible outcome in order for state property laws to survive constitutional scrutiny. *Id.* at 606.

A hierarchical church cannot be a viable authority consistent with its own governing principles if it is unable to retain a place of worship for its congregants in the face of a doctrinal dispute. For citizens to be allowed to exercise their First Amendment right to choose to worship in a hierarchical religious denomination, where record title to church property is held in the name of the local church, there must be rules such as Section 9142 (c) that allow the general denomination to control church property. By trying to invalidate Section 9142 (c), Petitioners seek to eliminate the distinction between a congregational church and a hierarchical church that allows its local churches to hold title to their property–i.e. the Episcopal Church and PCUSA.

In fact, Petitioners admit that their "pure" neutral principles of law approach would force PCUSA and the Episcopal Church to change their "polity" to mirror that of the Roman Catholic Church, with property being held by the Bishop or the Archbishop in a corporation sole. Petition, pp. 14-15. Such a rule would make it impossible for hierarchical churches, allowing title in the name of the local church, such as the Episcopal Church, to control the property of a local church without changing the entire church's polity. Petitioners' interpretation of Section 9142 (c) would force many hierarchical churches – i.e. the Episcopal Church – to change their polity by requiring title to the property of the local churches to be held in the name of a higher governing body of the hierarchical church. In

short, rather than violating Petitioners' rights of Free Exercise under the First Amendment, Section 9142 (c) protects the Free Exercise rights under the First Amendment of citizens who choose to worship in hierarchical churches where record title to church property is held in the name of the local church.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because:

- Petitioners' so-called "pure" neutral principles of law approach not only radically changes existing law but also violates the First and Fourteenth Amendments to the United States Constitution; and

- California Corporations Code § 9142 (c) is consistent with this Court's decision in *Jones v. Wolf* and does not violate either the Establishment or the Free Exercise Clauses to the First Amendment of the United States Constitution.

Respectfully Submitted,

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